Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALCAN ALUMINUM CORPORATION

Petitioner,

v.

PRUDENTIAL ASSURANCE COMPANY LIMITED

et al.

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the use of non-published non-precedential opinions violates the 14th Amendment when the purpose and effect of their use is to disguise differential treatment of similarly situated parties or the refusal of the inferior court to apply controlling precedent of this court.

Whether the Ninth Circuit violated the Federal Rules of Civil Procedure and Due Process when it devised a penalty for appealing by depriving Alcan of post judgment interest when it appealed only to increase the amount of a stipulated judgment.

Whether the Ninth Circuit violated this Court's explicit directive that non-appealing parties cannot enhance their legal position, by creating a right in the District Court to enhance a non-appealing parties post appeal position through the "exercise of discretion."

Whether the District Court violated *Erie v. Thompkins* when it refused to apply state law with respect to: (a) the existence of a state holiday; and (b) to the interpretation of its right to recovery under its comprehensive general liability policy.

Whether the Ninth Circuit's view that a United States Supreme Court decision of 1863 is still valid or the more recent view of the Fifth Circuit is correct in ruling that the Federal Rules of Civil Procedure preempt decisions of this Court to the extent there is, as in this case, a direct conflict.

RULE 14(b) – LIST OF PARTIES

Prudential Assurance Company Limited, absorbed into the Prudential Assurance Company of England Property & Casualty (Canada) acquired by General Accident Indemnity Company, part of the General Accident Assurance Company of Canada; Certain Underwriters at Lloyd's Of London, Continental Insurance Company; Orion Insurance Company Limited; The London & Overseas Insurance Company Limited; The Home Insurance Company; Commercial Union Assurance Company Of Canada Limited.

RULE 29.6--STATEMENT

Petitioner, Alcan Aluminum Corporation is a wholly owned subsidiary of Alcan Inc., a corporation organized and existing under the laws of Canada.

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The Opinion of the Ninth Circuit Court of Appeals concluded that the law of the State Of California as promulgated by the California Supreme Court precludes Alcan (1) from recovering under its triggered comprehensive general liability ("CGL") policies for continuous harm that extends beyond the policy period, and (2) an award of pre-judgment interest. This opinion of the Ninth Circuit dated January 24, 2002 is reprinted and set forth in the attached Appendix at A-1. The appellate opinion is based upon two consolidated appeals. The order of the United States District Court Central District of California dated December 8, 1999 is reprinted and set forth in the attached Appendix at A-6 was the first appeal regarding taxing the costs of the supersedeas bond, the order of the United States District Court Central District of California dated October 26, 1999 denying a Motion for Reconsideration is reprinted and set forth in the attached Appendix at A-17. The order of the United States District Court Central District of California dated August 24, 1999 is reprinted and set forth in the attached Appendix at A-28 which was the order from which reconsideration was requested and the subject of the second part of the appeal. Additionally, excerpts from a hearing conducted in the United States District Court Central District of California on November 24, 1997 are reprinted and set forth in the attached Appendix at A-39.

JURISDICTION

The United States Court of Appeals For the Ninth Circuit entered its judgment on January 24, 2002. The Jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONST. amend. XIV, §1

CAL. CIV. CODE §19853 (West 2001)

CAL. CIV. CODE §6700 (West 2001)

STATEMENT OF THE CASE

Recently, in a conference in London entitled **United States and International Litigation and Dispute Resolution**, Justice Sandra Day O'Connor was a featured speaker. In her remarks concerning the internationalization of United States Law, Justice O'Connor noted that consistency of legal doctrines among nations was important to, among other things, two critical objectives: predictability of legal obligations and consistency of treatment among comparable parties. This case is critically important because it demonstrates how far from reasonably achieving these goals we are in the federal court system. In fact, this case illustrates in a rather dramatic manner the fact that in the federal system we are increasingly frustrating achievement of these goals by permitting the practice of unpublished, non-precedential opinions ("NPOs") to be used to obviate judicial accountability and encourage judicial anarchy. In an age where the United States legal system generally, and the federal judicial system in particular, had been viewed as the example to be emulated by other nations, this case illustrates that we have allowed our system to silently erode the very principles which were the hallmarks of its greatness by essentially eliminating predictable legal doctrine and not insuring that comparably situated parties are similarly treated.

This case illustrates how established principles of this Court are routinely disregarded by the lower courts. It illustrates how fundamental notions of due process are disregarded. For example, in this case, the trial and appellate court actually construct an economic penalty against Alcan for exercising its right to appeal. They do this because both courts share a mutual dislike for California state law which they are obliged to follow in this diversity action but refuse to do so. They do not disclose their conduct, but attempt to bury it in the shadows of a NPO.

It is not a coincidence that this case raised the issue of the Ninth Circuit's attempt to disguise its refusal to apply California law in the context of Alcan insurance coverage action in the first appeal of this case, only to have the issue of NPOs explode as an issue shortly thereafter. *See Anastaoff v. United States*, 223 F.3d

898 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 233 F.3d 1054 (8th Cir. 2000).[1]

In *Anastoff* Judge Arnold pointed out precisely what Alcan had attempted to get this Court to recognize in the first appeal -- that legal doctrines were not being consistently applied. The Ninth Circuit has staked out its position as defender of the practice of differential treatment. However, this case and *Symbol Technologies Inc. v. Lemelson Medical, Education & Research Foundation LP*, 277 F.3d 1361 (Fed. Cir. 2002),[2] demonstrate that if this Court does not intervene to forestall the attack on the principles of predictability and consistency of treatment being clandestinely effected by the lower courts, then its stands to lose its moral authority and the public's trust.

The first appeal in this case demonstrated how the inferior courts can use the practice of NPOs to make this Court largely irrelevant in developing and setting legal policy. It did this by using a NPO to disguise the fact that the Ninth Circuit was flatly

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[1]Jerome I. Braun, *Anastoff v. United States: an update*, JUDICATURE, Sept-Oct 2001; Salem M. Katsh and Alex V. Chachkes, *Examining the Constitutionality of No-Citation Rules*, NEW YORK LAW JOURNAL, April 2, 2001; Jason Hoppin, *9th Circuit Takes Soft Line on No-Cite Rule*, THE RECORDER, May 7, 2001; Brigid McMenamin, *Justice in The Dark: Federal appeals judges say they are so overworked that they have to dispense quickie jurisprudence—meaning, no accountability*, FORBES, Oct. 30, 2000; Jose L. Fuentes and James F. Dial, *Uncouple Precedential Value of Opinions From Publication Status*, 161 NEW JERSEY LAW JOURNAL 1123 (September 11, 2000); Bruce Rubenstein, *75 Percent of Federal Appeals Result in Uncitable Decisions*, CORPORATE LEGAL TIMES, November, 1999; William Glaberson, *Legal Shortcuts Run Into Some Dead Ends*, N. Y. Times, Oct. 8, 2000.

[2]In *Lemelson*, the Federal Circuit established a new legal doctrine called "prosecution laches" in contradiction to prior case authority which was deemed non-precedential. Although the dissent tries to tip-toe over the clear contradiction by claiming courts need to issue non-precedential opinions, the dissent also points out that these opinions present a clear contradiction since these cases "point up the diversity of continuation practices." *Lemelson at 1522*. Neither the majority nor the dissent describe how a practitioner will know when his case will "follow the precedent" or deviate from it as an unpublished opinion. *Id.*

refusing to apply California state law in a diversity action. Where the California courts had explicitly declared that the "all sums" language of a Comprehensive General Liability Policy permitted the insured to seek recovery to policy limits once a policy was triggered regardless of the number of years over which the injury occurred, the Ninth Circuit refused to apply the law and instead tried to recharacterize it. The California Supreme Court's position was not only explicitly recognized and applied by a number of California appellate courts, it was explicitly acknowledged and adopted by the Supreme Court of Washington[3]. The Ninth Circuit refused to acknowledge this doctrine as the law of California.

After this Court refused to grant Certiorari on this clear rejection by the Ninth Circuit of the practical relevance of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) in the prior appeal in this case, the district court and Ninth Circuit became encouraged and emboldened by this Court's apparent indifference. They undertook a series of actions, the net effect of which was to significantly reduce the value of the portion of Alcan's judgment against its insurer which should have been beyond assault because it was stipulated to by the insurer. First, it undertook to impose a penalty against Alcan for having the audacity to appeal and argue that the federal courts were obligated to apply state law. It did this by disallowing any post judgment interest during the pendency of the appeal for undisputed amounts owed to Alcan in direct contravention of holdings of this Court. It created a new right in the district court to permit it to assign costs of the insurer's bond, posted to insure collection of undisputed amounts. The Ninth Circuit did this notwithstanding the fact that the insurer had never appealed its obligation to post a bond.

The Ninth Circuit also permitted the trial court to change the date of judgment on a post-appeal motion thereby further reducing the value of Alcan's judgment by reducing the rate of interest applicable after the appeal. Finally, the district court and the Ninth Circuit disregarded the fact that the Friday after

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[3] *American National Fire Insurance Co., v. B&L Trucking Co.*, 951 P. 2d. 250 (1998)

Thanksgiving is a state holiday, and that the Federal courts were closed for business and were inaccessible on that day. They did so in order to refuse to hear a significant portion of this appeal.[4] Again they attempt to disguise the reality of what is actually going on by the use of a NPO.

The reality is that the inferior courts have used NPOs to disguise the fact that they have blatantly ignored explicit precedent of this Court. They have used it to hide the fact that their holdings created clear disputes between the Circuits on pre-Victorian statements by this Court, and that they are again disregarding clear state law. Each of these actions alone would be a basis for review by this Court. Combined, they create a direct attack on the Constitutional Requirement of Equal Protection and threaten public trust in our judicial institutions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. PERMITTING COURTS TO RULE BY UNPUBLISHED-NON-PRECEDENTIAL OPINIONS CREATES THE OPPORTUNITY AND THE CONSEQUENCE FOR COURTS TO EFFECTIVELY DENY EQUAL PROTECTION TO PARTIES AND DO SO WITHOUT PUBLIC ACCOUNTABILITY WHICH IS A CRUCIAL ELEMENT OF CONTROL ON THE JUDICIARY AND AN IMPORTANT FACTOR IN MAINTAINING PUBLIC TRUST.

Various justifications have been offered to support the rules permitting courts to engage in NPOs. These have included the argument that those cases selected for that treatment are applying legal doctrine in routine, undisputed fashion, the cases are not important to the development of the law or that judges are too busy to thoughtfully consider and research every case which

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[4] UPS attempted to deliver the appeal to the district court on that Friday, the computed due date, but was unable to find anyone at the district court to accept delivery. There was no dispute as to this fact.

would be required if the case were to be precedential. Each of these justifications is meritless and this case illustrates that fact quite well.

First, the argument that NPO's are merely routine applications of legal doctrine in an essentially undisputed manner is refuted by the extraordinary number of these cases in which the trial court is reversed, the NPO results in splits between the Circuits and there are dissenting opinions.[5] This case contains many of these characteristics. In the first rendition of this case, which ultimately gave rise to this appeal, the trial court was reversed far more than it was affirmed. The case involves a clear split between the Ninth Circuit and the Fifth Circuit with respect to the relevance and application of an 1863 decision of this Court, to wit: whether a non-appealing party against whom an undisputed judgment lies is entitled to have its obligation to pay that amount stayed simply because the appealing party seeks a larger judgment. *Bronson & Soutter v. La Crosse & Milwaukee R.R.*, 68 U.S. 405 (1863). The notion that a party need not pay on a judgment while the opposing party is seeking to increase the judgment on appeal, is also a position that has no support in the present Federal Rules of Civil Procedure ("FRCP"). *See*, FED. R. CIV. P. §62. In appeal proceedings, the District Court and the Ninth Circuit extended this bizarre doctrine to not only permit the stay but to use it as a basis for reducing the value of the stayed judgment by using it as a basis for effectively amending the Federal Rules of Civil Procedure to remove any obligation to pay post judgment interest. This is hardly a routine application of the law, but a novel doctrine that has no historical basis. In effect, these courts attempt to use this 1863 case, promulgated almost a century before the adoption of the Federal Rules, to delete an explicit provision of those rules entitling parties to post judgment interest. This act can hardly be described as routine and not subject to dispute.

Second, the recent decision of the Federal Circuit in *Lemelson*, clearly demonstrates the falsity in the justification that NPO's are uncontroversial decisions. It also demonstrates the

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[5] Brigid McMenamin, *Justice In The Dark*, FORBES, Oct. 30, 2000 at 72.

fundamental problem with the practice—similarly situated parties are not being equally treated as required by the Equal Protection Clause of the Constitution[6].

Judge Kozinski has been a vocal advocate of the propriety of the practice of NPOs both in his opinions and the media and has attempted to justify the practice by strictly characterizing Judge's Arnold's opinion in *Anastasoff* as improper because he ignores the consequences of the practice. Instead, in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) Judge Kozinski uses a hyper-intellectualized technique to argue that since the Framers did not explicitly prohibit NPO's, we can only reach the conclusion that they did not intend to prohibit them by accepting "a very rigid conception of precedent, namely that all judicial decisions necessarily served as binding authority on later courts", *Id.* at 1163. We believe he misstates the essential argument of *Anastasoff* that a decision states the law to the extent necessary to resolve the dispute and "...must be applied in subsequent cases to similarly situated parties." *Anastasoff*, at 900. The facts of *Anastasoff*, notably never mentioned by Judge Kozinski, which formed the reason for the *Anastasoff* opinion is that a request was being made to the court to treat two similarly situated parties differently without any apparent justification for the disparate treatment. Judge Kozinski's attempt to ignore the reality of the issue and transform it into intellectual discussion concerning the rigidity in applying precedent is both dishonest and disingenuous.

The explicit Constitutional basis for prohibiting NPOs can be found in the Equal Protection Clause and the practical application of that doctrine—those are the practical mechanisms to insure that the courts are applying the law to similar parties in the same way. Precedent can change, but it must do so rationally, visibly and PERMIT EVERYONE TO BENEFIT FROM THE CHANGE.

Court's cannot violate the Equal Protection Clause. There must be a practical mechanism to insure that the courts comply with that requirement. *Anastasoff* properly points out that requiring consistent application of the law is a control which prevents preferential treatment of those we like and different

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[6] U.S. CONST. amend. XIV, § 1.

treatment of the disfavored. Transparency is another important part of that control. William G. Ross in his history of the courts entitled, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURT*, 1890-1937, Princeton University Press (1994), acknowledged the important role of public response on curbing judicial behavior:

> The breath of public dissatisfaction with judicial decisions may have influenced the courts to render decision that did not stray too far from prevailing public sentiment regarding social and economic questions. As C. Herman Pritchett once observed, public support for judicial power has remained firm because 'the Court has generally told the country what it wanted to hear, and provided a constitutional case for what the dominant interests in the nation wanted to do.

Id. at 314.

The unstated agenda in Judge Kozinski's doctrine is that courts are above the law and beyond public scrutiny and accountability. Stated in practical terms and illustrated by the application of his doctrine in *Lemelson* (where contrary treatment existed between the published opinion and the non-published opinion): we can do what we want to whomever we want and we are not accountable to the public for explaining or even disclosing what we did. Is there serious doubt by Judge Kozinski that this is Constitutionally improper!

Judge Kozinski's attempt to justify this practice by reference to historical circumstance ignores the minimal potential in the past for courts to engage in unaccountable, preferential treatment. Historically, the existence of far fewer cases and a smaller cadre of practitioners, naturally led to a greater awareness of judicial conduct and more potential for review by this Court, making abhorrent conduct less likely. Times have changed dramatically. Review by this Court is less likely making other methods of insuring judicial accountability more necessary. Judge Kozinski refuses to acknowledge the fact that the existence and potential for abuse today is a far more serious issue than in the past.

Another variation of this logic that preferential treatment is acceptable is embodied in the argument that NPO's are justified because precedential opinions require the rigors of analysis, thought and research that cannot be invested in all cases. Perhaps Judge Kozinski could share with us the standards he and his colleagues use to determine whose case deserves thoughtful consideration and whose does not. Further, would Judge Kozinski share with the public the consequences of those decisions so the public may decide whether judicial conduct is appropriate. Commentators who have conducted research in this area have concluded that judges are wholly incapable of predicting which cases will turnout in the future to have significant general application. *See*, PAMELA FOA, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977-78).

The principle of the Kozinski position is that judges are above the law and accountable to no one but themselves, except in the rare instances where the conduct is sufficiently massive and egregious that enough political will can be mustered to result in legislative action. For the bulk of the victims, such as Alcan in this case and the victims in *Lemelson* and *Anastasoff*, there is no practical remedy. It is the recognition of this fact by Judge Arnold in *Anastasoff* that the courts are not treating everyone the same; they are engaging in discriminatory conduct, that the other limited means of remedy, including appeal to this Court, are ineffective to properly and effectively deal with this real problem -- that is the essence of his opinion. Judge Kozinski chooses to ignore the reality of the problem and intellectualize his response, because he knows its true and has no credible direct response.

The conduct by the Ninth Circuit in this case evidences patently unequal treatment and attempts to not only cloak its unconstitutional conduct, but also to invite this Court to condone its conduct by indifference.

II. THE LOWER COURTS IN THIS CASE IMPLEMENT THE UNJUST PRINCIPLE THAT EXERCISING A RIGHT TO AN APPEAL WILL RESULT IN THE

IMPOSITION OF A PENALTY AND DENIAL OF FUNDAMENTAL DUE PROCESS RIGHTS.

This case is a clear example of how the lower courts have been able to surreptitiously construct a penalty for challenging their refusal to apply state law. The Ninth Circuit achieves this result by refusing to apply state law and ignoring that the Friday after Thanksgiving is a state holiday and burying the decision in a NPO. This was done in total disregard for the procedural due process rights of Alcan, and effectively penalized Alcan for taking its appeal by denying the appeal and not giving Alcan an opportunity to vindicate its entitlement to post judgment interest.

One of the two present appeals in this case involved an undoubtedly controversial principle—that a prevailing party at the trial court who elected to appeal to enhance its award could be penalized for electing to do so by forfeiting post judgment interest. In economic terms the real value of its uncontested award would be reduced in value. This was an expansion of this Court's decision in *Bronson & Soutter v. La Crosse & Milwaukee R.R.*, 68 U.S. 405 (1863), which is not even arguably supported by any reasonable construction of the holding of that case.

In this case, Lloyd's, one of Alcan's excess carriers and a party subject to the appeal, stipulated to a minimum level of liability. Alcan appealed arguing that the district court had incorrectly applied California law and sought to increase the judgment. A more definite statement of California law on the precise issue in this case was at issue before the California Supreme Court during Alcan's appellate process in the federal court. *See Aerojet-General Corp. v. Transport Indemnity Corp.*, 948 P.2d 909 (1997).

Each of the carriers other than Lloyd's who had stipulated to an undisputed amount of liability promptly paid Alcan what they owed. Lloyds argued that it was entitled to an automatic stay. It was undisputed that the Federal Rules of Civil Procedure did not permit such a stay. Instead, Lloyds argued that *Bronson*, an equity decision of this Court entitled it to a stay. Alcan replied citing a more recent case from the Fifth Circuit, which rejected the

continued relevance of this case in light of the adoption of the federal rules which only permitted stays in certain circumstances.[7]

The district court concurred with the Fifth Circuit, but created an entirely new basis for a stay, the exercise of its discretion to permit a stay contingent on Lloyds supplying of a bond. The district court could not and did not cite to any rule that applied. The Court explicitly stated that its discretion in allowing the bond was based on his knowledge of the difficulty that his former client, Lloyds, would have collecting twice from its syndicates if Alcan's appeal was successful.[8]

Alcan countered that the district court had no discretion to effectively construct new federal rules to suit the personal needs of his former client and effectively put Alcan into the bridge loan business. Further, Alcan pointed out that post judgment interest under the federal rules was far less than Alcan's actual cost of capital and that as a consequence the delay would reduce the value of the judgment to Alcan (and since Lloyds cost of capital was also likely far more than the post judgment interest it would be a windfall to Lloyds). The district refused to increase the post judgment rate and Alcan appealed.

Lloyds appealed NO issue, including the determination by the district court that it must post a bond and pay post judgment interest. However, in response to Alcan's argument that the district court had acted improperly in creating a special exception to the federal rules for its former client, particularly in light of the fact that it was based explicitly on the judge's personal experiences in representing that client, Lloyds again argued it was

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[7] *Enserch Corp. v. Shand Morahand & Co., Inc.* 918 F.2d 462 (5th Cir. 1990).

[8] United States District Court, Central District of California Hearing Dated Nov. 24, 1997: " THE COURT: Yes. Counsel for Alcan takes a position that it's a market rate advantage that Underwriters are trying to use. Now, this is outside the record, but based upon my - - when I was representing underwriters, it doesn't work that way. There are all sorts of syndicates that sign on for a piece of the action. And now, there's one allocation so they'd have to collect that. If Alcan then wins, then, there's another allocation, and they'd have to go back again. They can never close their books out...." A-39.

entitled to an automatic stay citing as authority *Bronson*. The Ninth Circuit agreed stating that Alcan had no right to challenge the judge's stay since Lloyds was in fact entitled to an automatic stay. The Ninth Circuit's opinion not only reversed the trial court's reasoning, but put itself in direct conflict with the Fifth Circuit. Surprisingly, or perhaps in retrospect not so surprisingly, the Ninth Circuit chose to make its opinion non-published and non-precedential. The Circuit's concluding comments on the issue made it clear that Alcan had received greater benefits than it was entitled under its view of the law. *Alcan Aluminum Corporation v. Prudential Assurance Co. Ltd., et. al.*, 173 F.3d 859, 1999 US. App. LEXIS 12785 (9th Cir. 1999), *cert denied*, 528 U.S. 1077 (2000). However, since Lloyd's had not appealed, presumably Alcan could not lose the benefits the trial court had granted.

The Ninth Circuit was confronted with a problem. If Lloyds had appealed the Ninth Circuit would have had to directly confront the legal issue posed by the conflicting appeals. The law would have required Alcan lose completely or Lloyds lose completely and the Circuit would have had to directly acknowledge the conduct by the district court in explicitly using his experience from his prior practice for this defendant to carve out a remedy for them. The present format allowed a Solomonesque approach (splitting the baby), and by rendering the NPO they were not exposing themselves to treat someone, who was in legal terms similarly situated, the same. Meanwhile, the Ninth Circuit could avoid embarrassing the district court by hiding the fact that it gave its former client (Lloyd's) preferential treatment. What the Ninth Circuit had not counted on was that the district court would interpret their action as an invitation to further enhance its former client's position. After the conclusion of the first appeal, the district court then proceeded to change the date of the judgment significantly reducing the interest rate for post judgment interest from the date the mandate issued until the judgment was paid and entirely eliminating all of the post judgment interest during the pendency of the appeal, thereby dramatically reducing the real value of the stipulated liability. The district court justified this action claiming that the Ninth

Circuit had ordered it to do it, notwithstanding the fact that it could point to nothing in the Circuit's former opinion that supported that claim.

However, what was perhaps more outrageous is that Lloyd's had not appealed and, therefore, the Ninth Circuit could not enlarge Lloyd's rights, as the district court claimed it had done. An unambiguous statement by this Court in *U. S. v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (an appellee who had not cross-appealed could not "attack the decree with a view...to enlarging his own rights."), and a recent application of the doctrine by the Second Circuit in *International Ore & Fertilizer Corp v. SGS*, 38 F.3d 1279 (2nd Cir. 1994); *cert. denied* 115 S. Ct. 2276 (1995), made it clear that appellate courts were without authority to do what the district court in this case claimed it was compelled to do as a result of the Ninth's Circuit's holdings. The district court in this case ignored both *Railway Express* and *International Ore*.

In addition, this Court's explicit statement as to the purpose of post-judgment interest in keeping a party whole (which was well after *Bronson*), would have effectively overruled it assuming *arguendo* that *Bronson* had held post judgment interest did not accrue during an automatic stay.[9] This was also ignored by the district court. When these actions were appealed, it created a problem for the Ninth Circuit. Because of the extreme nature of the facts, the potential of exposing their prior improper conduct existed which they buried under the cloak of a NPO in the first appeal. But fate gave them a way out. They could avoid the appeal altogether by simply finding it was not filed on time.

The appeal with respect to post judgment interest was due on Friday, November 26, 1999, the day after Thanksgiving. All government offices, including the State and Federal Courts were on holiday, except the Federal Courts had a "skeletal staff" for

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[9] *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 49 U.S. 827, 835-836 (1990) where this Court stated: "The purpose of post judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant."

"emergency filing" only. (United States District Court Central District of California, Court Observed Holidays at http://www.cacd.uscourts.gov). When Alcan called the clerk's office to determine the appropriate filing procedure, it was told that the normal filings were shifted to Monday. Nonetheless, since the appeal was completed it was sent overnight by United Parcel Service ("UPS") who attempted unsuccessfully to deliver on Friday, November 26, 1999. The appeal was subsequently filed on Monday.

Upon its receipt, the Ninth Circuit raised the issue as to whether the Alcan filing was timely and remanded the case to district court for a hearing on accessibility. Appendix at A-3. The hearing process in the district court did not even make an effort to make believe any provisions of due process were provided. Alcan was given no right to discovery, no right to present witnesses and no right of cross-examination. What occurred was the trial court produced two court employees. This was in response to information Alcan's counsel could glean from conversation with clerk's staff suggesting that there were so few people around that the likelihood of raising anyone's attention at any particular time could have been impossible. These two employees were never officially identified. They were not subject to discovery or cross-examination and essentially agreed with the district court's view that they were around if UPS looked hard enough.

Needless to say these employees never took the stand but nodded obligingly from the back of the courtroom and of course were not under oath. Based on this and the district court's prior view that UPS and FED EX were generally incompetent, it found the court was accessible. The Circuit in its NPO noted that Alcan had not shown the courthouse was "officially closed" or accessible only by "heroic measures". Nonetheless, there was no dispute that the courthouse was not officially open as that term is understood in common parlance and that Alcan had filed every document in this case over the years it proceeded timely and precisely in the same manner.

The next issue was whether Friday was an official state holiday. The Federal Rules of Appellate Procedure ("FRAP") clearly provide that if the computed service date fell on a state

holiday, the due date was moved to the next official court business date.[10] There was no dispute that all non-essential state and federal employees were on a holiday. All the state office web sites described state offices as being closed for state holiday. The California Supreme Court had declared the day an official judicial holiday.[11] The U.S. District Court was itself, on holiday.

Notwithstanding all of the above, the Ninth Circuit determined that the day after Thanksgiving is not an official state holiday. There is no dispute that CAL. GOV'T CODE §19853 states that the Friday after Thanksgiving is a state holiday. The Circuit concluded that this is merely "administrative" in nature and sets out an employment policy. However, the Federal Rules provide no limitation as to how a state may "declare" a holiday. Moreover, CAL. GOV'T CODE §6700, which the Ninth Circuit attempts to rely upon as a basis for denying it as a state holiday, clearly provides the contrary:

> The holidays in this state are:....
>
> (o) Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday....

The Circuit's disingenuous attempt to ignore Cal. Gov't Code Section 19853 which appoints the day after Thanksgiving a holiday, and artificially limit the reality of a declared state holiday can only be accomplished by hiding the reality of its conduct in the cloak of an NPO. The Friday after Thanksgiving is a state holiday. It has all the attributes of one. It is described in the Court's and Government Code as a holiday. If the Ninth Circuit were compelled to make its holding precedential it would be untenable. It clearly wants to apply incredible "logic" to Alcan alone—having no intention to apply it uniformly to similarly situated parties because to do so would uncloak its own prior improper conduct.

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[10] Fed. R. App. P. § 26

[11] *See California Sch. Employees Assoc. v. Governing Bd. Of the Marin Cnty. Coll. Dist., 8 Cal. 4th 333, (1994)* which held that a "holiday" is "a day on which government offices would be closed. *Id.* at 343. The CAL. GOV'T. CODE § 19853 provides that all employees shall be entitled to holidays including the day after Thanksgiving.

III. THE CIRCUIT TOTALLY DISREGARDS THE FEDERAL RULES OF CIVIL PROCEDURE, IGNORES CONTROLLING PRECEDENT OF THIS COURT, CREATES AN EXPLANATION FOR DISTRICT COURT CONDUCT WHICH WAS CONTRARY TO THE DISTRICT COURT EXPLANATION AS TO WHAT IT DID, AND AGAIN USES UNPUBLUBLISHED-NONPRECENDENTIAL OPINIONS TO HIDE ITS CONDUCT.

The district court required Lloyd's to place a bond on the undisputed amount that it owed Alcan as a basis for obtaining a stay pending Alcan's appeal. Lloyd's did not appeal this requirement. As noted earlier, as a result of Alcan's appeal the Circuit noted that Lloyd's would have been entitled to an automatic stay.

After the first appeal, Lloyd's sought to recover the cost of their bond pursuant to the "Rules". The Clerk's office refused to assess the cost of the bond to Alcan noting that it still owed the money subject to the bond and had not appealed its obligation to post a bond, thus FRAP 39(a) does not apply. This rule, the Clerk noted, presumes a bond was posted pursuant to Rule 62. Lloyd's then appealed to the district court. The district court reasoned that Lloyd's had posted a bond pursuant to its "extended application" of FRCP 62, thus FRAP 39(a) applied. Appendix at A-15.

Moreover, Alcan pointed out that the Ninth Circuit could not have given Lloyd's its cost of the bond since it had not appealed. Alcan cited the district court to the clear statement of the law by this Court that a party who does not appeal is not entitled to enhance its position if it appears during the appeal that had it appealed it would have prevailed. *See Railway Express, supra* at 435. Alcan further referred the district court to a more recent decision of the Second Circuit, which explicitly applied this Court's directive that non-appealing parties were not entitled to enhance their positions as a result of the appeal. *International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 38 F.3d 1279 (2nd Cir. 1994), *cert. denied* 515 U.S. 1122 (1995).

The district court chose to ignore this explicit doctrine and ordered Alcan to pay the cost of Lloyd's bond. A-6. Alcan appealed that decision. (*Alcan Aluminum Corporation v. Prudential Assurance, et al.* Docket No. 00-55163) The Ninth Circuit consolidated this appeal with the appeal regarding post judgment interest. (*Alcan Aluminum Corporation v. Prudential Assurance, et al.* Docket No. 99-56951). Since it was due to be filed on a different date the Circuit was unable to avoid it by holding that the Friday after Thanksgiving was not a legal holiday.

The Ninth Circuit sustained this ruling using a NPO in an even more bizarre manner than was occasioned by its prior holdings. Confronted with the fact that explicit precedent from this Court precluded it from enhancing Lloyd's position since it did not appeal, and the rules did not provide that Alcan pay the bond, it concluded that the district court enhanced Lloyd's position after appeal, it concluded that the district court, in fact, enhanced Lloyds position by its exercise of discretion. A-4-5. This novel doctrine permits a district court to enhance non-appealing party's positions after appeal even though the Ninth Circuit cannot.

This is such a blatant charade around this Court's clear directives. Moreover, it is a direct challenge by the Circuit to this Court's right to establish legal doctrine and expect the Circuits to apply it. The authority cited by the Circuit for this proposition—the right of district court prior to appeal to assess legal fees is not even arguably relevant to the proposition for which the Ninth Circuit attempts to cite it. *LSO, Ltd. v. Stroh,* 205 F.3d 1146 (9th Cir. 2000).

Once again, to mask the refusal of the Circuit to follow this Court's directive the Circuit uses NPO. This Court should not tolerate such subterfuge in challenges to its authority. If the Circuit had explicitly rejected the rule of this Court in *Railway Express*, this Court would clearly respond. The impact on Alcan is no different than such a direct rejection; however, the use of NPO is simply an attempt by the Ninth Circuit to escape accountability to this Court for its conduct and should be treated by this Court no differently than a direct challenge to its authority.

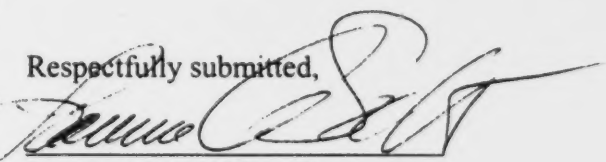
IV. Conclusion

This case involves every condition defined by Supreme Court Rule 10 as a circumstance that is appropriate for this Court to exercise it's discretion of review. The only difference is that the Circuit uses the technique of NPO to disguise the reality of unacceptable judicial conduct. The problem is that this case may well reflect the norm rather than the exception. Jerome I. Braun, in a recent article in *Judicature* argued that a lawyer's ethical obligation to his clients requires intentional violations of the rules prohibiting citation to NPO and reference NPO to the extent one can even ascertain the existence.[12]

Judge Arnolds' concerns about the extent to which this practice is perverting the integrity of our legal system are real and well illustrated by this case. They deserve the considered attention by this Court.

Dated: April 19, 2002

Respectfully submitted,



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[12] Jerome I. Braun, *Anastasoff v. United States: An Update*, Judicature Sept.-Oct. 2001

FILED JAN 24, 2002

CATHY A. GATTERSON CLERK,
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALCAN ALUMINUM CORPORATION Plaintiff-counter-defendant-Appellant vs. PRUDENTIAL ASSURANCE COMPANY LIMITED, absorbed into the Prudential Assurance Company Of England Property & Casualty (Canada) acquired by General Accident Indemnity Company, part of the General Accident Assurance Company Of Canada: CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, Defendants-counter-claimants-Appellees, CONTINENTAL INSURANCE COMPANY; ORION INSURANCE COMPANY LIMITED; THE LONDON & OVERSEAS INSURANCE COMPANY LIMITED; THE HOME INSURANGE COMPANY; Defendants-Appellees COMMERCIAL UNION ASSURANCE COMPANY OF CANADA LIMITED,	No.99-56951 No. 00-55163 D.C. No. CV-94-02202 DT MEMORANDUM

Appeal from the United States District Court
For the Central District of California

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted, December 5, 2001
Pasadena, California

BEFORE: LEAVY, T.G. NELSON, and W. FLETCHER, Circuit Judges.

Alcan Aluminum Corporation ("Alcan") appeals the district court's post-judgment interest rulings and the court's order taxing costs against Alcan. We dismiss the post-judgment interest appeal for lack of jurisdiction and affirm the district court's cost-taxing order.

I

The first time this case came before us, we rejected Alcan's arguments that the district court should have awarded Alcan a larger judgment and that the court erred in granting a stay of the judgment against certain underwriters at Lloyd's of London ("Lloyd's") on the groud that Lloyd's had posted a supersedes bond.[1] On remand, Lloyd's successfully moved the district court for two rulings regarding the accrual of post-judgment interest and for an order taxing the costs of Lloyd's supersedeas bond against Alcan. Alcan now appeals those rulings.

II

[1] *See Alcan Aluminum Corp. v. Prudential Assurance Ltd.*, 173 F.3d 859, 1999 WL 201610 (9th Cir. 1999) (mem).

Alcan's notice of appeal of the district court's post-judgment interest rulings was due on November 26, 1999, which was the Friday after Thanksgiving day. Alcan filed its appeal on the following Monday, November 29, 1999. Alcan's filing was timely only if the district court clerk's office was "inaccessible" on the Friday after Thanksgiving,[2] or if that day was "declared a holiday" in California.[3]

This court ordered a limited remand to the district court to determine if the clerk's office was "inaccessible" on the Friday in question. The district court found that it was not. This factual finding is supported by the record and is not clearly erroneous.[4] Thus, the district court clerk's office was not "inaccessible" within the meaning of Rule 26(a)(3)[5] on Friday, November 26, 1999.

We reject Alcan's alternative argument that the Friday after Thanksgiving is "declared a holiday" by California Government Code Section 19853. Section 19853 is administrative in nature and merely sets forth employment policy for state employees.[6] In contrast, California Government Code Section 6700 explicitly lists "[t]he holidays in this state[,]" and the list does not include the Friday after Thanksgiving.[7] Accordingly, the Friday after Thanksgiving has not been "declared a holiday" in California within the meaning of Rule 26(a)(4).[8]

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[2] Fed. R. App. P. 26(a)(3).

[3] *Id.* at (4).

[4] *See United States v. Hughes Aircraft Co.*, 162 F.3d 1027, 1030 (9th Cir.1998) ("[A] district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous.") We also note that Alcan has not, shown that the clerk's office was "officially closed" or accessible only by "heroic measures" on the Friday in question. *Keyser v. Sacramento City Unjfied Sch. Dist.*, 265 F.3d 741, 747 (9th Cir. 2001).

[5] *See* Fed. R. App. P. 26(a)(3).

[6] *See* Ca. Govt. Code §19853 (West 2001).

[7] *Id.* §6700

[8] *See* Fed. R. App. P. 26(a)(4).

Thus, Alcan's notice of appeal was due on Friday, November 26, 1999. Alcan's Monday, November 29, 1999, filing was, therefore, not timely. Accordingly, we have no jurisdiction to hear Alcan's appeal of the district court's post-judgment interest rulings because a timely filing of a notice of appeal is "mandatory and jurisdictional."[9]

III

The district court granted Lloyd's motion to tax the costs (premiums) of Lloyd's supersedeas bond against Alcan. We review the district court's award of costs for abuse of discretion.[10] We conclude that the district court was well within its discretion and affirm.

After appealing the stipulated judgment, Alcan moved the district court to order Lloyd's to satisfy the judgment. Alcan's appeal automatically stayed the judgment, however, and Alcan had no right to force Lloyd's to pay.[11] Thus, but for Alcan's insistence that Lloyd's satisfy the judgment when Lloyd's had no legal obligation to do so, Lloyd's would never have had to post the bond. The bond then served to protect Alcan's interests.[12] Under these circumstances, the district court was well within its discretion in taxing the costs of the bond against Alcan. Alcan' s arguments are meritless because they ignore the foregoing facts and invite us to conclude that Lloyd's had no rights to protect during the pendency of Alcan's appeal. However, Lloyd's had a right to a stay during the pendency of Alcan's appeal. That right was created by Alcan's decision to appeal, and Alcan's actions forced Lloyd's to pay to protect that right.

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[9] *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978) (internal quotation marks and citation omitted); *Pettibone v. Cupp*, 666 F.2d 333, 334 (9th Cir. 1981).

[10] *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160 (9th Cir. 2000).

[11] *See Alcan*, 173 F.3d at 859, 1999 WL 201610 at **4 ("once Alcan filed its appeal. . . the execution of the judgment against its insurers was automatically stayed") (citing *Bronson v. La Crosse & Milwaukee R.R. Co.*, 68 U.S. 405, 409-10 (1863)).

[12] *See id.* ("The supersedeas bond actually provided Alcan protection that it was not entitled to.").

IV

Alcan's appeal of the district court's post-judgment interest rulings was not timely, and it is DISMISSED for lack of jurisdiction. The district court appropriately taxed Lloyd's supersedeas bond premiums as costs against Alcan, and that order is AFFIRMED.

No. 99-5695 1 is DISMISSED; no. 00-55 163 is AFFIRMED.

Costs to Appellees.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
DEC. 6 1999
ENTERED
DEC 8 1999

ALCAN ALUMINUM CORPORATION Plaintiff V PRUDENTIAL ASSURANCE COMPANY LIMITED, ET AL. Defendants	CASE NO. CV 94-2202 DT (CTx) ORDER **GRANTING** LLOYD'S UNDERWRITERS' MOTION TO RETAX COSTS
AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	

Background

1. **Factual Summary.**

This insurance coverage action arises out of a dispute between Plaintiff Alcan Aluminum Corporation ("Alcan") and its primary and excess insurance providers over the failure to defend and indemnify Alcan in two underlying actions.

On April 21, 1983, the United States of America and the State of California filed an action entitled United States et al v. J.B. Stringfellow, Jr., et al., CV 83-2501 JMI (Mx) in the United States District for Central District of California (the "Federal Action") against numerous defendants including Alcan. The Federal Action sought damages for clean-up costs for the Stringfellow Hazardous Waste Disposal Site (the "Site"), located in Riverside County, California pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980

(CERCLA), 42 U.S.C. § 9601 et seq. See First Amended Complaint, ¶ 25.

On September 28, 1984, a consolidated action entitled Penny Newman, et al. v. J.B. Stringfellow, Jr. .et. al., Case Nos. 165994 MF, 167122, 167173, 167291, 167327, 167467, 16791, 168088, 168349, 168591, 168939, 169223, 16910, 169999 was filed in the Superior Court of the State of California for the County of Riverside (collectively, the "Newman Actions"). *See id.* at ¶ 26. In the Newman Actions, plaintiffs (the "Newman Plaintiffs") consisted of present and former residents of Glen Avon, California, a community adjacent to the Site. The Newman Plaintiffs sued the owners and operators of the Site, and numerous chemical, industrial and manufacturing companies, including Alcan, for personal injury and property damages stemming from the air and water contamination released from the Stringfellow Acid Pits. See id.

From 1966 through 1973, primary, excess and/or umbrella insurance policies (the "Insurance Policies") were issued to Alcan by Defendants Prudential Assurance Company Limited[13] ("Prudential"), Continental Insurance Company ("Continental"), Certain Underwriters of Lloyd's of London ("Lloyd's Underwriters"), Orion Insurance Company Limited ("Orion"), the London & Overseas Insurance Company Limited ("Overseas"), The Home Insurance Company ("Home") (collectively, the "Insurance Companies"). See Id. at ¶¶ 3, 14. Commercial Union Assurance Company of Canada ("Commercial Union") issued primary policies from August 1973 through November 1981 (the "Commercial Union Policies"). See id. at ¶ 15.

Despite Alcan's notice to the Insurance Companies of the Federal Action and Newman Actions, the Insurance Companies allegedly refused to investigate the claims raised in the Newman Actions, and failed to provide a defense or to indemnify Alcan in

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[13] Prudential was absorbed into Prudential Assurance Company of England Property and Casualty - Canada ("Prudential Canada"). See id. at ¶ 3. On September 1, 1993, General Accident Indemnity Company of Canada ("GAIC") acquired Prudential Canada. See id. at ¶ 3.

either the Federal Action or the Newman Actions. See id. at ¶¶ 23, 27, 29. As a result, Alcan undertook its own investigation and defense of the Newman Actions and allegedly settled those actions for $4,281,591. See id. at ¶ 26.

B. Procedural History.

On April 6, 1994, Alcan filed the original Complaint against the Insurance Companies for breach of contract, breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty.

On January 18, 1995, Alcan filed its First Amended Complaint against the Insurance Companies for breach of contract, breach of the covenant of good faith and fair dealing and breach of fiduciary duty. Lloyd's Underwriters was a named Defendant, but the Answer and Counterclaim was filed by John Richard Ludbrooke Youell, on his own behalf and as a representative of Certain Underwriters at Lloyd's of London ("Youell and Others") on February 27, 1995.

On May 10, 1995, Alcan executed a Stipulation of Dismissal of Home, and Youell and Others without prejudice, based upon a tentative settlement reached with those defendants.

On February 20, 1996, Alcan filed a Motion For Leave To File Second Amended Complaint.

On June 19, 1997, this Court entered Judgment in favor of Alcan against Defendant Lloyd's Underwriters requiring said Defendant to pay Alcan the sum of one million five hundred forty four thousand three hundred two dollars and fifty-three cents ($1,544,302.53), with post judgment interest at the rate of 6.06 percent.

On June 27, 1997, this Court entered judgment in favor of Commercial Union on GAIC's Cross-Claim against Commercial Union.

On July 18, 1997, this Court entered an Amended Judgment in favor of Alcan against Defendant Lloyd's Underwriters in the same amount, with post judgment interest at the rate of 6.06 percent.

Alcan filed an appeal on August 1, 1997 on the issue of damages with the Ninth Circuit Court of Appeals.

On September 10, 1997, Alcan filed an Undifferentiated Motion for Order Directing Defendant Lloyd's Underwriters To Pay on Judgment. That Motion was granted by this Court on October 6, 1997 by Order entered on October 7, 1997.

On October 21, 1997, Lloyd's Underwriters filed a Supersedeas Bond in the amount of $1,132,341.06, reflecting the gross judgment of $1,544,302.53, reduced by the proportionate share of insolvent companies not represented by counsel for Lloyd' s Underwriters.

On October 31, 1997, GAIC filed its Motion to Vacate and Re-Enter Judgment pursuant to Fed. R. Civ. P. 60 (b). That Motion was denied by this Court on November 24, 1997 by Order entered on November 26, 1997.

On November 18, 1997, Defendant Lloyd's Underwriters filed an Ex Parte Application for Clarification of October 7, 1997 Order Regarding Execution of Judgment and/or Motion to Effect Stay. That Ex Parte Application was granted by this Court on November 24, 1997 by Order entered on November 26, 1997.

On December 8, 1997, Alcan filed a document styled as a "Motion for Rehearing and/or Motion to Evaluate Adequacy of Supersedeas Bond." Because that purported Motion lacked a proper form of notice pursuant to Central District Local Rule 7.4, this Court deemed that purported Motion as an Ex Parte Application, which was denied by this Court on January 14, 1998.

On January 21, 1998, Alcan filed a Motion for Contempt Against Prudential (acquired by GAIC) for Failure to Pay Amended Judgment, which was taken off calendar as moot on March 13, 1998 after Alcan and GAIC filed a Stipulation to File Supersedeas Bond Staying Judgment Pending Cross-Appeal.

On February 17, 1998, Alcan filed an appeal of the January 14, 1998 Order Denying Alcan's Motion for Rehearing and/or Motion to Evaluate Adequacy of Supersedeas Bond with the Ninth Circuit Court of Appeals.

On March 31, 1999, the Ninth Circuit Court of Appeals issued a decision affirming in part and reversing in part the judgment of this Court. Specifically, the Ninth Circuit

(1) affirmed this Court' s order granting summary judgment in favor of Continental,

(2) affirmed this Court's order allocating to Alcan a share of the defense and indemnity costs arising out of the Federal Action and the Newman Action,

(3) affirmed this Court's decision denying Alcan prejudgment interest in regard to costs in the Federal Action,

(4) reversed this Court's decision granting Alcan prejudgment interest in regard to costs in the Newman Action,

(5) reversed this Court's decision allocating costs to GAIC that were attributable to the Newman Plaintiffs who were exposed to hazardous materials after the last GAIC policy expired,

(6) affirmed this Court's decision denying GAIC a set-off based on the pre-litigation settlement between Alcan and Commercial, and

(7) affirmed this Court's order staying the execution of the judgment in favor of Alcan and allowing Lloyd's Underwriters to post a supersedeas bond.

The Ninth Circuit also awarded costs to GAIC, Lloyd's Underwriters, Home and Continental.

On July 28, 1999, Lloyd's Underwriters filed a Motion for Adjustment of Post Judgment Interest. Also on July 28, 1999, this Court granted Lloyd's Underwriters Ex Parte Application for Order to Shorten Time to Notice Hearing and to Set Hearing for August 2, 1999. On August 2, 1999, this Court ordered the mandate from the Ninth Circuit filed and spread.

Pursuant to stipulation of the parties, the hearing on Lloyd Underwriters' Motion for Adjustment of Post-Judgment Interest was continued until August 23, 1999. On August 23, 1999, this Court granted Lloyds s Underwriters' Motion for Adjustment of Post Judgment Interest by Order entered on August 24, 1999.

On September 1, 1999, Alcan filed the Motion and Notice for Reconsideration of Order Dated August 23, 1999.

On September 3, 1999,' Alcan filed the Notice of Continuance of Motion for Reconsideration to October 4, 1999. On September 22, 1999, this matter was continued until October 25, 1999.

On September 20, 1999, this Court filed an Order Amending Judgment pursuant to the Ninth Circuit 's mandate and this Court's rulings of August 23, 1999 in the following respects:

(1) Plaintiff recovers from Defendant GAIC as follows:

(a) Sum of $848,061.35 with respect to the Stringfellow action, with post judgment interest thereon at the rate of 5.56%;

(b) Sum of $53,539.90 with respect to the Newman action, plus post judgement interest at the rate of 5.56%.

(2) Plaintiff recovers from Defendant Home with respect to the Stringfellow action for the sum of $6,461.51 with post judgment interest at the rate-of 5.56%.

(3) Plaintiff recovers from Defendant Underwriters with respect to the Stringfellow action the sum of $1,544,302.53 subject to reduction due to insolvencies which resulted in a final judgment of $1,132,341.06 with post judgment interest at the rate of 5.56%. The parties have agreed that Certain Underwriters at Lloyd's will have sixty (60) days from the date of this Order to collect and distribute the amounts.

(4) Pursuant to this Court's ruling of August 23, 1999, post judgment interest at a rate of 5.56% shall accrue from July 18, 1997, until August 1, 1997; shall be stayed from August 2, 1997, until August 2, 1999; and shall accrue again from August 2, 1999 until the Amended Judgment is paid.

On September 1, 1999, Alcan filed A Motion for Reconsideration. On October 25, 1999, this Court denied Alcan's

Motion for Reconsideration for Order dated August 23, 1999, which was entered on October 26, 1999.

On November 1, 1999, Lloyd's Underwriters filed a Notice of Motion and Motion to Retax Costs. This matter is presently before the Court.

Discussion

1. Standard

The Federal Rules of Appellate Procedure ("F.RA.P.") provide for the costs to be taxed, unless the law provides or the court orders otherwise, in the following manner:

(1) If an appeal is dismissed, costs shall be taxed against the appellant unless, unless the parties agree otherwise;

(2) If judgment is affirmed, costs shall be taxed against the appellant;

(3) If judgment is reversed, costs shall be taxed against the appellee;

(4) If a judgment is affirmed in part, reversed in part, modified or vacated, costs are taxed only as ordered by the court.

See FED. R. ApP. PROC. 39(a). Additionally, the F.R.AP. specifies that premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal shall be taxed as costs of the appeal in favor of the party entitled to costs. See FED. R. APP. Proc. 39(e). The Local Rules of this district provide that the costs on appeal taxable in the district court shall be governed under F.R.A.P. 39(e). See Local Rule 16.4.15.

Further, Local Rule 16, "Taxation of Costs," sets forth the procedure for filing a Notice of Application to the Clerk to Tax Costs as well as items taxable as costs. Local Rule 16.7 provides for a review of the Clerk's taxation of costs. The review may be

obtained through a motion to retax which must be filed and served within five days of the Clerk's decision. This review is limited to only those items specifically identified in the motion. See Local Rule 16.7.

2. Analysis.

a. Introduction

On July 13, 1999, Lloyd's Underwriters filed a Notice to Clerk to Tax Costs against Alcan in the amount of $32,646.00. (See Motion to Retax ("Motion") p.3, lines 3-6). This amount is representative of the 1997 and 1998 annual premiums for Lloyd's Underwriters' supersedeas bond. (See Motion, p.3, line 6). On July 21, 1999, Alcan filed an objection to the Notion to Tax Costs. (See Motion, p.3, lines 7-8). On October 25, 1999, the Clerk of Court denied Lloyd's Underwriters' Application. (See Motion, p.3, lines 8-9). According to Alcan's Opposition, the Clerk of Court found that since Alcan was seeking only to increase the amount of its judgement against Lloyd's Underwriters, and Lloyd's Underwriters would have to pay at least the amount covered by the bond, the circumstances were not those contemplated by F.RA.P. 39(e). (See Opposition to Motion to Retax, p.2, lines 4-8).

b. This Court Grants the Motion to Retax

Lloyd's Underwriters seeks review of the Clerk of Court's denial of its Application to Tax Costs. Specifically, Lloyd's Underwriters argues that the Local Rules and F.R.AP. specifically allow for the taxation of premiums paid for a supersedeas bond. Additionally, Lloyd's Underwriters contends that the taxation of costs is governed by the plain language of the F.R.A.P. and is not subject to the discretion of the Clerk of the court.

In contrast, Alcan argues that F.R.AP. 39(a) has no application in the present case and may not be used by the Court to tax the costs of Lloyd's Underwriters' supersedeas bond.

Specifically, Alcan argues that in this Court's November 24, 1999 Order, this Court found that Federal Rule of Civil Procedure ("F.R.C.P.") 62(d) does not apply to the facts of this case. As such, Alcan argues that since the application of F.R.A.P. 39(a) presumes the application of F.R.C.P. 62(d), Rule 39(a) is not applicable. This Court does not agree with Alcan's arguments.

In the Order dated November 24, 1997, this Court stated in pertinent part:

> Fed. R. Civ. P. 62(d) provides that an appellant may stay the execution of a judgment by posting a supersedeas bond. . Although Fed. R. Civ. P. 62(d) specificall.y addresses the use of a supersedeas bond by an appellant to stay execution of a judgment, this Court finds no reason why an appellee should not be able to stay execution of a judgment by giving a supersedeas bond. The posting of a supersedeas bond by Lloyd's Underwriters means that Alcan will be protected during the pendency of appeal in this action. Hence, this Court finds in its discretion that a stay is warranted.

As stated above, this Court found that while F.R.C.P. 62(d) does not directly state that an appellee may use the supersedeas bond to stay execution of a judgment, extension of the rule to appellees was not without reason. Contrary to Alcan's argument, this Court did not make the broad finding that F.R.C.P. 62(d) was inapplicable to this case. Rather, this Court extended the application of a F.R.C.P. Moreover, not only are the F.R.C.P. applicable, but the F.RA. P. are also applicable.

Lloyd's Underwriters argue that the language of the Local and Appellate Rules specifically allow for taxation of premiums paid for a supersedeas bond. This Court agrees. F.R.A.P. 39(a) provides four instances where costs are granted. Included is when the "judgment is affirmed or reversed in part . . . costs shall be allowed only as ordered by the court." FED. R. PROC. 39(a). In the Ninth Circuit decision, filed March 31, 1999, the Ninth Circuit

affirmed in part and denied in part Alcan's appeal. The Ninth Circuit awarded costs to the Defendant-Appellee Lloyd's Underwriters.

As previously noted, F.R.A.P. 39(e) provides for the costs on appeal taxable in the district courts. The language of the rule specifically states that the "premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal . . . *shall be* taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule." FED. R. APP. PROC. 39(e) (emphasis added). Accordingly, this Court finds that the language of the statute is not discretionary in nature, and it was error for the Clerk of Court to deny the Application to Tax Costs.

Accordingly, this Court finds that pursuant to F.R.A.P. 39(e), the premiums paid by Lloyd's Underwriters for cost of its supersedeas bond to preserve its rights pending appeal are taxable as costs.

Conclusion

Based on the foregoing, this Court GRANTS Lloyd's Underwriters' Motion to Retax Costs and AWARDS Lloyd's Underwriters the amount of $32,646.00 which represents the 1997 and 1998 annual premiums for Lloyd's Underwriters' supersedeas bonds.

IT IS SO ORDERED.

DATED: DEC-6 1999

DICKRAN TEVRIZIAN, Judge

Dickran Tevrizian, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
OCT. 25 1999
ENTERED
OCT 26 1999

ALCAN ALUMINUM CORPORATION Plaintiff V PRUDENTIAL ASSURANCE COMPANY LIMITED, ET AL. Defendants	CASE NO. CV 94-2202 DT (CTx) ORDER **DENYING** ALCAN ALUMINUM CORPORATION'S MOTION FOR RECONSIDERATION FOR ORDER DATED AUGUST 23, 1999
AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	

Background

1. **Factual Summary.**

This insurance coverage action arises out of a dispute between Plaintiff Alcan Aluminum Corporation ("Alcan") and its primary and excess insurance providers over the failure to defend and indemnify Alcan in two underlying actions.

On April 21, 1983, the United States of America and the State of California filed an action entitled United States et al v. J.B. Stringfellow, Jr., et al., CV 83-2501 JMI (Mx) in the United States District for Central District of California (the "Federal Action") against numerous defendants including Alcan. The Federal Action sought damages for clean-up costs for the Stringfellow Hazardous Waste Disposal Site (the "Site"), located in Riverside County, California pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980

(CERCLA), 42 U.S.C. § 9601 et seq. See First Amended Complaint, ¶ 25.

On September 28, 1984, a consolidated action entitled Penny Newman, et al. v. J.B. Stringfellow, Jr. .et. al., Case Nos. 165994 MF, 167122, 167173, 167291, 167327, 167467, 16791, 168088, 168349, 168591, 168939, 169223, 16910, 169999 was filed in the Superior Court of the State of California for the County of Riverside (collectively, the "Newman Actions"). *See id.* at ¶ 26. In the Newman Actions, plaintiffs (the "Newman Plaintiffs") consisted of present and former residents of Glen Avon, California, a community adjacent to the Site. The Newman Plaintiffs sued the owners and operators of the Site, and numerous chemical, industrial and manufacturing companies, including Alcan, for personal injury and property damages stemming from the air and water contamination released from the Stringfellow Acid Pits. See id.

From 1966 through 1973, primary, excess and/or umbrella insurance policies (the "Insurance Policies") were issued to Alcan by Defendants Prudential Assurance Company Limited[14] ("Prudential"), Continental Insurance Company ("Continental"), Certain Underwriters of Lloyd's of London ("Lloyd's Underwriters"), Orion Insurance Company Limited ~("Orion"), the London & Overseas Insurance Company Limited ("Overseas"), The Home Insurance Company ("Home") (collectively, the "Insurance Companies"). See Id. at ¶¶ 3, 14. Commercial Union Assurance Company of Canada ("Commercial Union") issued primary policies from August 1973 through November 1981 (the "Commercial Union Policies"). See id. at ¶ 15.

Despite Alcan's notice to the Insurance Companies of the Federal Action and Newman Actions, the Insurance Companies allegedly refused to investigate the claims raised in the Newman Actions, and failed to provide a defense or to indemnify Alcan in

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[14] Prudential was absorbed into Prudential Assurance Company of England Property and Casualty - Canada ("Prudential Canada").See id. at ¶ 3. On September 1, 1993, General Accident Indemnity Company of Canada ("GAIC") acquired Prudential Canada. See id. at ¶ 3.

either the Federal Action or the Newman Actions. See id. at ¶¶ 23, 27, 29. As a result, Alcan undertook its own investigation and defense of the Newman Actions and allegedly settled those actions for $4,281,591. See id. at ¶ 26.

B. Procedural History.

On April 6, 1994, Alcan filed the original Complaint against the Insurance Companies for breach of contract, breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty.

On January 18, 1995, Alcan filed its First Amended Complaint against the Insurance Companies for breach of contract, breach of the covenant of good faith and fair dealing and breach of fiduciary duty. Lloyd's Underwriters was a named Defendant, but the Answer and Counterclaim was filed by John Richard Ludbrooke Youell, on his own behalf and as a representative of Certain Underwriters at Lloyd's of London ("Youell and Others") on February 27, 1995.

On May 10, 1995, Alcan executed a Stipulation of Dismissal of Home, and Youell and Others without prejudice, based upon a tentative settlement reached with those defendants.

On February 20, 1996, Alcan filed a Motion For Leave To File Second Amended Complaint.

On June 19, 1997, this Court entered Judgment in favor of Alcan against Defendant Lloyd's Underwriters requiring said Defendant to pay Alcan the sum of one million five hundred forty four thousand three hundred two dollars and fifty-three cents ($1,544,302.53), with post judgment interest at the rate of 6.06 percent.

On June 27, 1997, this Court entered judgment in favor of Commercial Union on GAIC's Cross-Claim against Commercial Union.

On July 18, 1997, this Court entered an Amended Judgment in favor of Alcan against Defendant Lloyd's Underwriters in the same amount, with post judgment interest at the rate of 6.06 percent.

Alcan filed an appeal on August 1, 1997 on the issue of damages with the Ninth Circuit Court of Appeals.

On September 10, 1997, Alcan filed an Undifferentiated Motion for Order Directing Defendant Lloyd's Underwriters To Pay on Judgment. That Motion was granted by this Court on October 6, 1997 by Order entered on October 7, 1997.

On October 21, 1997, Lloyd's Underwriters filed a Supersedeas Bond in the amount of $1,132,341.06, reflecting the gross judgment of $1,544,302.53, reduced by the proportionate share of insolvent companies not represented by counsel for Lloyd' s Underwriters.

On October 31, 1997, GAIC filed its Motion to Vacate and Re-Enter Judgment pursuant to Fed. R. Civ. P. 60 (b). That Motion was denied by this Court on November 24, 1997 by Order entered on November 26, 1997.

On November 18, 1997, Defendant Lloyd's Underwriters filed an Ex Parte Application for Clarification of October 7, 1997 Order Regarding Execution of Judgment and/or Motion to Effect Stay. That Ex Parte Application was granted by this Court on November 24, 1997 by Order entered on November 26, 1997.

On December 8, 1997, Alcan filed a document styled as a "Motion for Rehearing and/or Motion to Evaluate Adequacy of Supersedeas Bond." Because that purported Motion lacked a proper form of notice pursuant to Central District Local Rule 7.4, this Court deemed that purported Motion as an Ex Parte Application, which was denied by this Court on January 14, 1998.

On January 21, 1998, Alcan filed a Motion for Contempt Against Prudential (acquired by GAIC) for Failure to Pay Amended Judgment, which was taken off calendar as moot on March 13, 1998 after Alcan and GAIC filed a Stipulation to File Supersedeas Bond Staying Judgment Pending Cross-Appeal.

On February 17, 1998, Alcan filed an appeal of the January 14, 1998 Order Denying Alcan's Motion for Rehearing and/or Motion to Evaluate Adequacy of Supersedeas Bond with the Ninth Circuit Court of Appeals.

On March 31, 1999, the Ninth Circuit Court of Appeals issued a decision affirming in part and reversing in part the judgment of this Court. Specifically, the Ninth Circuit

(1) affirmed this Court' s order granting summary judgment in favor of Continental,

(2) affirmed this Court's order allocating to Alcan a share of the defense and indemnity costs arising out of the Federal Action and the Newman Action,

(3) affirmed this Court's decision denying Alcan prejudgment interest in regard to costs in the Federal Action,

(4) reversed this Court's decision granting Alcan prejudgment interest in regard to costs in the Newman Action,

(5) reversed this Court's decision allocating costs to GAIC that were attributable to the Newman Plaintiffs who were exposed to hazardous materials after the last GAIC policy expired,

(6) affirmed this Court's decision denying GAIC a set-off based on the pre-litigation settlement between Alcan and Commercial, and

(7) affirmed this Court's order staying the execution of the judgment in favor of Alcan and allowing Lloyd's Underwriters to post a supersedeas bond.

The Ninth Circuit also awarded costs to GAIC, Lloyd's Underwriters, Home and Continental.

On July 28, 1999, Lloyd's Underwriters filed a Motion for Adjustment of Post Judgment Interest. Also on July 28, 1999, this Court granted Lloyd's Underwriters Ex Parte Application for Order to Shorten Time to Notice Hearing and to Set Hearing for August 2, 1999. On August 2, 1999, this Court ordered the mandate from the Ninth Circuit filed and spread.

Pursuant to stipulation of the parties, the hearing on Lloyd Underwriters' Motion for Adjustment of Post-Judgment Interest was continued until August 23, 1999. On August 23, 1999, this Court granted Lloyds s Underwriters' Motion for Adjustment of Post Judgment Interest by Order entered on August 24, 1999.

On September 1, 1999, Alcan filed the Motion and Notice for Reconsideration of Order Dated August 23, 1999.

On September 3, 1999,' Alcan filed the Notice of Continuance of Motion for Reconsideration to October 4, 1999. On September 22, 1999, this matter was continued until October 25, 1999.

On September 20, 1999, this Court filed an Order Amending Judgment pursuant to the Ninth Circuit 's mandate and this Court's rulings of August 23, 1999 in the following respects:

(1) Plaintiff recovers from Defendant GAIC as follows:

(a) Sum of $848,061.35 with respect to the Stringfellow action, with post judgment interest thereon at the rate of 5.56%;

(b) Sum of $53,539.90 with respect to the Newman action, plus post judgement interest at the rate of 5.56%.

(3) Plaintiff recovers from Defendant Home with respect to the Stringfellow action for the sum of $6,461.51 with post judgment interest at the rate-of 5.56%.

(3) Plaintiff recovers from Defendant Underwriters with respect to the Stringfellow action the sum of $1,544,302.53 subject to reduction due to insolvencies which resulted in a final judgment of $1,132,341.06 with post judgment interest at the rate of 5.56%. The parties have agreed that Certain Underwriters at Lloyd's will have sixty (60) days from the date of this Order to collect and distribute the amounts.

(4) Pursuant to this Court's ruling of August 23, 1999, post judgment interest at a rate of 5.56% shall accrue from July 18, 1997, until August 1, 1997; shall be stayed from August 2, 1997, until August 2, 1999; and shall accrue again from August 2, 1999 until the Amended Judgment is paid.

On September 1, 1999, Alcan filed the instant Motion for Reconsideration. This matter is presently before the Court with

reference to this Court's August 23, 1999, Order as well as this Court's subsequent Order of September 20, 1999.

Discussion

1. **Standard**

This Court is empowered to reconsider its own decisions prior motions pursuant to Local Rule 7.16. This rule provides on that:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion -for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

2. Analysis.

a. Introduction

As a result of Alcan's appeal regarding this Court's November 24, 1997 ruling asserting that the Court erred by allowing Lloyd's Underwriters to post a supersedeas bond, or in the alternative, that the amount of the supersedeas bond was insufficient, the Ninth Circuit found that because the prevailing party appealed the Court's judgment, the execution of the judgment should have been automatically stayed. Based on the Ninth Circuit decision, Underwriters filed a Motion for Adjustment of Post Judgment Interest on July27, 1999, asserting that (1) due to the ruling requiring an *automatic stay, post*-judgment interest should not have accrued during that time period; (2) the proper rate of post-judgment interest is 5.56%, not 6.06%;

and (3) the inception date of post-judgment interest should be the date the Court entered its judgment.

Alcan opposed this motion by asserting that because Lloyd's Underwriters did not appeal from the Court's orders, they should not benefit from the Ninth Circuit's opinion. Additionally, Alcan specifically stated that it did not oppose Lloyd's Underwriters' position regarding the rate or the inception date of post-judgment interest.

On August 23, 1999, this Court granted Lloyd's Underwriters' motion and held that (1) the proper interest rate of post-judgment interest is 5.56%; (2) the inception date for post-judgment interest is July 18, 1997; and (3) post-judgement interest is owing from July 18, 1997 to August 1, 1997 and from August 2, 1999 until the date such judgment is paid. it is from this modification that Alcan is requesting a reconsideration of this Court's order.

b. Reconsideration of this Court's Order dates August 23, 1999, together with any subsequent modification of that Order is not warranted.

In the present case, Alcan fails to meet any of the requirements set forth in Local Rule 7.16. Instead, Alcan attempts to relitigate the issues which were previously before the Court. Accordingly, Alcan's arguments fail procedurally and substantively.

In its Opposition to the Motion for Adjustment of Post Judgment Interest filed July 27, 1999, Alcan argued that Lloyd's Underwriters' failure to appeal this Court's judgments barred Underwriters from bringing any further motion on this claim.

Similarly, in the present Motion for Reconsideration, Alcan is arguing that the appealing party' s judgment cannot be modified to benefit the adversary that did not appeal. Accordingly, Alcan states that the instant Motion for Reconsideration is based on recent and clear authority that even if the Ninth Circuit's ruling became the law of the case, the Court of Appeals could not change a judgment when the party seeking to enhance the judgment did not cross-appeal.

This Court does not agree. Primarily, the argument Alcan presently relies upon repeats the arguments it made before this Court in its Opposition to the previous Motion for Adjustment of Post-Judgment Interest. Moreover Alcan has failed to assert any new material difference in fact or law from that presented to the Court which reasonable diligence could not known prior. The "clear and convincing" authorities upon which Alcan bases this Motion for Reconsideration are International Ore & Fertilizer Corp. v SGS, 38 F.3d 1279 (2nd Cir. 1994) and Abatti v. Commissioner of the IRS, 859 F.2d 115 (9th Cir. 1988). Both cases were discoverable through reasonable diligence prior to the filing of Alcan's Opposition to the Motion for Adjustment of Post-Judgment Interest on August 10, 1999. Therefore, Alcan does not meet the requirement of Local Rule 7.16(a) for a motion for reconsideration.

Further, Alcan has failed to (1) state the emergence of new material facts or change of law after this Court's decision or (2) manifest a showing of failure to consider material facts presented to the Court before such decision. As such, Alcan's Motion for Reconsideration does not fit into the requirements of Local Rule 7.16(b), (c). Accordingly, this Court finds that the Motion for Reconsideration of the Judgment dated August 23, 1999, together with any subsequent modification of that Order, is not warranted.

c. Even if the reconsideration were warranted, this Court finds that the Order complained of is proper

Alcan asserts that the appealing party's judgment cannot be modified to benefit the adversary that did not appeal. Alcan specifically argues that even if the Ninth Circuit explicitly stated that Alcan is not entitled to post judgment interest, the judgment could not have been modified due to Lloyd's Underwriters' failure to appeal.

Alcan relies upon International Ore & Fertilizer Corp v. SGS, 38 F.3d 1279 (2 Cir. 1994). Alcan asserts that International Ore stands for the position that the judgment of a non-appealing party can not be modified. Although this Court agrees that

International Ore does state that judgment *may* not be modified due to a party's failure to cross-appeal it, these remarks were made in dicta and are not binding. See id. at 1283-84. As such, this Court does not agree that this case is controlling.

As noted in this Court's order of August 23, 1999, Alcan's argument is without merit. Primarily, the Supreme Court held that an appeal by a prevailing party suspended the execution of any decree. See Bronson & Soutter, 68 U.S. 405, 409-410 (1893). The Ninth Circuit relied on Bronson in the present action. As such, this is the law of the case and a District Court - is bound by this prior determination of the action by the appellate court. See Thomas v. Bible, 983. F.2d 152, 155 (9th Cir. 1993). Further, the policy behind post judgment interest clearly serves to protect a. prevailing party upon appeal by a losing party. That is not the case here.

Moreover, this Court has not amended the judgment to put Alcan at a loss. The amended Judgment of July 18, 1997, contained the same damages award in favor of Alcan. The Ninth Circuit specifically stated upon Alcan's appeal that execution of the Amended Judgment was stayed upon the initiation of the appeal. As such, *this* Court, pursuant to the Ninth Circuit ruling, stayed the post judgment interest from August 2, 1997 (the date following Alcan's filing of its notice of appeal) until August 1, 1999 (the date prior to the filing and spreading of the Ninth Circuit's mandate). Post judgment interest began to accrue again as of August 2, 1999, until such future date as the Amended Judgment is paid. Therefore, this Court finds that the Order of August 23, 1999, together with any subsequent modification of that Order, is proper.

2. Conclusion

After reviewing Alcan's Motion for Reconsideration for Order dated August 23, 1999, Underwriters' Opposition to the Motion, and this Court's prior Order, this Court DENIES Alcan's Motion for Reconsideration.

IT IS SO ORDERED.

DATED: OCT 25 1999

DICKRAN TEVRIZIAN, Judge

Dickran Tevrizian, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 23 1999
ENTERED
AUG 24 1999

ALCAN ALUMINUM CORPORATION Plaintiff v PRUDENTIAL ASSURANCE COMPANY LIMITED, ET AL. Defendants	CASE NO. CV 94-2202 ORDER **GRANTING** UNDERWRITERS' MOTION FOR ADJUSTMENT OF POST JUDGMENT INTEREST
AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	

Background

1. **Factual Summary.**

This insurance coverage action arises out of a dispute between Plaintiff Alcan Aluminum Corporation ("Alcan") and its primary and excess insurance providers over the failure to defend and indemnify Alcan in two underlying actions.

On April 21, 1983, the United States of America and the State of California filed an action entitled United States et al v. J.B. Stringfellow, Jr., et al., CV 83-2501 JMI (Mx) in the United States District for Central District of California (the "Federal Action") against numerous defendants including Alcan. The Federal Action sought damages for clean-up costs for the Stringfellow Hazardous Waste Disposal Site (the "Site"), located in Riverside County, California pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980

(CERCLA), 42 U.S.C. § 9601 et seq. See First Amended Complaint, ¶ 25.

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From 1966 through 1973, primary, excess and/or umbrella insurance policies (the "Insurance Policies") were issued to Alcan by Defendants Prudential Assurance Company Limited[15] ("Prudential"), Continental Insurance Company ("Continental"), Certain Underwriters of Lloyd's of London ("Lloyd's Underwriters"), Orion Insurance Company Limited ("Orion"), the London & Overseas Insurance Company Limited ("Overseas"), The Home Insurance Company ("Home") (collectively, the "Insurance Companies"). See Id. at ¶¶ 3, 14. Commercial Union Assurance Company of Canada ("Commercial Union") issued primary policies from August 1973 through November 1981 (the "Commercial Union Policies"). See id. at ¶ 15.

Despite Alcan's notice to the Insurance Companies of the Federal Action and Newman Actions, the Insurance Companies allegedly refused to investigate the claims raised in the Newman Actions, and failed to provide a defense or to indemnify Alcan in

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either the Federal Action or the Newman Actions. See id. at ¶¶ 23, 27, 29. As a result, Alcan undertook its own investigation and defense of the Newman Actions and allegedly settled those actions for $4,281,591. See id. at ¶ 26.

B. Procedural History.

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On January 18, 1995, Alcan filed its First Amended Complaint against the Insurance Companies for breach of contract, breach of the covenant of good faith and fair dealing and breach of fiduciary duty. Lloyd's Underwriters was a named Defendant, but the Answer and Counterclaim was filed by John Richard Ludbrooke Youell, on his own behalf and as a representative of Certain Underwriters at Lloyd's of London ("Youell and Others") on February 27, 1995.

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On December 8, 1997, Alcan filed a document styled as a "Motion for Rehearing and/or Motion to Evaluate Adequacy of Supersedeas Bond." Because that purported Motion lacked a proper form of notice pursuant to Central District Local Rule 7.4, this Court deemed that purported Motion as an Ex Parte Application, which was denied by this Court on January 14, 1998.

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(2) affirmed this Court's order allocating to Alcan a share of the defense and indemnity costs arising out of the Federal Action and the Newman Action,

(3) affirmed this Court's decision denying Alcan prejudgment interest in regard to costs in the Federal Action,

(4) reversed this Court's decision granting Alcan prejudgment interest in regard to costs in the Newman Action,

(5) reversed this Court's decision allocating costs to GAIC that were attributable to the Newman Plaintiffs who were exposed to hazardous materials after the last GAIC policy expired,

(6) affirmed this Court's decision denying GAIC a set-off based on the pre-litigation settlement between Alcan and Commercial, and

(7) affirmed this Court's order staying the execution of the judgment in favor of Alcan and allowing Lloyd's Underwriters to post a supersedeas bond.

The Ninth Circuit also awarded costs to GAIC, Lloyd's Underwriters, Home and Continental.

On July 28, 1999, Lloyd's Underwriters filed a Motion for Adjustment of Post Judgment Interest, which is before this Court today.

Also on July 28, 1999, this Court granted Lloyd's Underwriters Ex Parte Application for Order to Shorten Time to Notice Hearing and to Set Nearing for August 2, 1999. Pursuant to stipulation of the parties, the hearing was continued until August 23, 1999.

On August 2, 1999, this Court ordered the mandate from the Ninth Circuit filed and spread.

Discussion

1. **Standard.**

A. Post Judgment Interest

28 U.S.C. § 1961(a) provides in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

28 U.S.C. § 1961(a); see also American Tetephone and Telegraph Company v. United Computer Systems, Inc., 98 F.3d 1206, 1210 (9th Cir. 1996).

Pursuant to Federal Rule of Appellate Procedure 37, when an appellate court affirms a money judgment in a civil case, "whatever interest is allowed by law is payable from the date when the district court's judgment was entered." Fed. R. App. P. 37.

B. Motion to Correct Clerical Error

Rule 60(a) of the Federal Rules of Civil Procedure permits a court to correct clerical mistakes and errors or omissions in a court order "at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Fed. R. Civ. P. 60(a).

2. Analysis.

A. Post Judgment Interest For The Period Of Alcan's Appeal To The Ninth Circuit Is Unmerited.

On March 31, 1999, the Ninth Circuit affirmed this Court's decision to stay the execution of judgment against Lloyd's Underwriters and to allow Lloyd's Underwriters to file a supersedeas bond pending Alcan's appeal. The Ninth Circuit relied upon Bronson & Soutter v. La Crosse & Milwaukee R.R, 68 U.S. 405, 409-10 (1893), and concluded that "once Alcan filed its appeal challenging the merits of the district court's allocation order, the execution of the judgment against its insurers was automatically stayed." Decision on Appeal, p. 13. The court also stated that "[t]he supersedeas bond actually provided Alcan protection that it was not entitled to because a bond was not required to stay the execution of the judgment in this case." Id. Therefore, the Ninth Circuit concluded that any execution of the judgment entered by this Court was automatically stayed by Alcan's appeal.

Lloyd's Underwriters contends that post judgment interest during the pendency of Alcan's appeal, from August 1, 1997 until August 2, 1999 when the filing and spreading of the mandate occurred in this Court, is not recoverable by Alcan. Alcan counters that because Lloyd's Underwriters did not elect to appeal its obligation under the supersedeas bond, it is obligated under that bond to pay post judgment interest. Alcan's argument is without merit.

In Bronson & Soutter, the Supreme Court held that an appeal by a prevailing party suspended the execution of any decree.

> The appeal suspends the execution of the decree. This is not the case where security is to be given in order to supersede the execution. That rule applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined.

Id. at 409-10. The instant case mirrors Bronson & Soutter. On June 19, 1997, this Court entered a Judgment in favor of Alcan. On July 18, 1997, this Court entered an Amended Judgment which contained the same damages award in favor of

Alcan. Alcan, the prevailing party, appealed. As the Ninth Circuit explicitly stated, execution of the Amended Judgment was stayed upon Alcan's initiation of its appeal. This is law of the case. See Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993). Further, the policy behind post judgment interest clearly serves to protect a prevailing party *upon appeal by a losing party.* This is not the present case.

As such, Lloyd's Underwriters obligation to pay post judgment interest was stayed from August 2, 1997 (the date following Alcan's filing of its notice of appeal) until August 1, 1999 (the date prior to the filing and spreading of the Ninth Circuit's mandate). Post judgment interest began to accrue again as of August 2, 1999, until such future date as the Amended Judgment is paid.

B. July 18, 1997 .Is The Proper Inception Date At A Post Judgment Interest Rate 5.56%.

Lloyd's Underwriters confusingly argues for an inception date to be determined by this Court. In its moving papers, Lloyd's Underwriters erroneously interchanges its relevant dates[16]. Nonetheless, this Court understands Lloyd's Underwriters to seek an inception date of July 18, 1997, the date which the Amended Judgment was entered by this Court. Alcan insists that the proper inception date is June 18, 1999, the date of the entry of the original Judgment in this case (although Alcan also cites an erroneous date as the original Judgment was entered on June 19, 1997). This Court agrees with Lloyd's Underwriters proposed inception date.

The general rule for post judgment interest after an appellate court affirms the district court is that the earlier judgment serves as the inception date. Fed. R. App. P. 37(a). On the other hand, "when an appellate court reverses a judgment for one party and directs entry of a money for judgment for the other, Post Judgment interest runs from the date of the entry of the

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[16] See e.g, Motion, p. 9: 21-22 ("The amended judgment was entered by this Court on June 18, 1997").

second judgment on remand." American Telephone and Telegraph Co. v. United Computer Systems, Inc., 98 F.3d 1206 (9th Cir. 1996). However, even in these instances, an equitable exception exists where damages are "sufficiently ascertained" in the judgment. In such cases, no one judgment controls, and instead the policy behind section 1961 of ensuring that a "plaintiff is further compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant" must be preserved. Id. at 1209. In, Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990), the court concluded that "[w]here a prior judgment awarding damages has been vacated pursuant to the actions of an ultimately losing party, equitable principles favor calculating the interest in a manner that more fully compensates the prevailing party." Id. at 835-36. However, this rules refer to the relationship between the appellate court's remand order and the district court's initial judgment.

Although the Ninth Circuit did affirm in part and reverse in part the judgment by this Court, the decision as to the underlying damages remained unchanged. Moreover, the two judgments at issue both preceded the Ninth Circuit remand. This Court is persuaded that, as between the Judgment and the Amended Judgment, the entry date of the Amended Judgment is the proper inception date to use. The date of entry of the Amended Judgment in July 18, 1997.

Lloyd's Underwriters suggests that this Court can elect to apply the rule in Briggs v. Pennsylvania Railroad Co., 334 U.S. 304, 306 (1948), and begin post judgment interest at some future date determined by this Court. However, this Court is not persuaded that Briggs applies. In Briggs, the Court determined that the district court lacked the power on remand to enlarge a judgment by including a post judgment interest award that was not contemplated in the appellate court's mandate *nor* was included in the original judgment. Such is not the case at bar. Post Judgment interest was already provided in both the original Judgment and the Amended Judgment entered by this Court.

Using July 18, 1997 as the proper inception date, the proper post judgment interest rate is calculated by using "the last

auction of the fifty-two week United States Treasury bills settlement immediately prior to the date of the judgment." 28 U.S.C. § 1961(a). The Auction price as of July 17, 1997 was 5.56 percent. This Court notes that this rate is taken from the most recent 1999 Cumulative Annual Pocket Part for 28 U.S.C. § 1961. Lloyd's Underwriters misquotes the appropriate rate as 5.65% which is actually the rate as of June 19, 1997. Thus, the proper post judgment interest rate in this case is 5.56 percent, not 6.06 percent as indicated in the Amended Judgment.

Pursuant to its powers under Federal Rule of Civil Procedure 60(a), this Court corrects its clerical mistake in the Amended Judgment as follows: (1) the proper inception date is July 18, 1999, and (2) the proper post judgment interest rate is 5.56 percent.

Conclusion

Based on the foregoing analysis, this Court GR.M~TS Lloyd's Underwriters Motion for Adjustment of Post Judgment Interest. The proper post judgment interest: inception date is July 18, 1997, and the proper post judgment interest rate is 5.56 percent. Post Judgment interest is owing from July 18, 1997 until August 1, 1997, and again from August 2, 1999 until such future date as the Amended Judgment is paid.

IT IS SO ORDERED.

DATED: AUG 23 1999 DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALCAN ALUMINUM CORPORATION Plaintiff V PRUDENTIAL ASSURANCE COMPANY LIMITED, ET AL. Defendants	CASE NO. CV 94-2202 DT (CTx) Los Angeles, California Monday, November 24, 1997
AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	

HEARING BEFORE
THE HONORABLE DICKRAN TEVRIZIAN
UNITED STATES DISTRICT COURT

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

Pages 7-9 reprinted below:

THE COURT: The Plaintiff is Alcan. You're the appellant. And you want the Court's allocation to be adjusted upward so that underwriters pays you more money.

MR. SALIBRA: Right. But they will never pay us - - in fact, I should point out to the Court that, in fact, the bond they have does not comply with the rules because it does not include interest. It is the - - it does not cover the interest that would accrue just under the post-judgment interest digit.

THE COURT: All right. Let me find out from underwriters.
Why is it that you are posting a supersedeas bond and want to delay payment in this matter when, on appeal, whatever happens, you're not going - - should you prevail on appeal, you're still going to end up paying the amount of money, which is now $1,132,341, which is the amount - - the gross judgment was a million 5 and some change.

MR. SEVER: Your honor, we argued this point at some length with respect to our previous visit here, which was whether we have to post a bond or whether there's an automatic stay when we are the appellee.
First of all, let me clarify. I'm not here to make money on behalf of Underwriters or for my firm. The critical issue here for London is one that has to do with collection. I think you're probably familiar enough with London to know what a nightmare it is to collect funds - -
THE COURT: I used to represent various underwriters.

MR. SEVER: Yes. The reason - -

THE COURT: They pass it - - everybody passes it around. It's the old-fashioned way. Signs off, and everybody has to put a check in there.

MR. SEVER: That's correct, your Honor. It is for that reason that Underwriters are using their right to take a supersedeas bond as opposed to actually paying the money. Because what we have there is an argument that we are going to be having to re-collect the money to reallocate that money to all the various companies after the appeal. And rather that do that, rather than have to reallocate, based on whatever the verdict is with the Ninth Circuit, we want to use the right that we think we are given under the federal rules to post a bond. What I'm hearing here from counsel for Alcan is basically arguing against the entire supersedeas bond process. It seems to me the point is if we've got a right under the federal rules to post a bond, then, the reasons for the posting of that bond should be irrelevant.

THE COURT: Yes. Counsel for Alcan takes a position that it's a market rate advantage that Underwriters are trying to use. Now, this is outside the record, but based upon my - - when I was representing underwriters, it doesn't work that way. There are all sorts of syndicates that sign on for a piece of the action. And, now, there's one allocation so they'd have to collect that. If Alcan then wins, then there's another allocation, and they'd have to go back again. They can never close their books out. That's one of the problems that Underwriters has from their point of view. Your argument is, you know, it's a market rate. So we're really going outside the record of this thing and trying to find out what the reasons are. I don't think there's a problem here by having Underwriters post the supersedeas bond because Alcan is protected. You're going to get your money. Whether you get the amount that's – the supersedeas bond which reflects the proportionate share of the judgment, or you get more if the Ninth circuit says my allocation was incorrect, that - - you , know, you'll

get your money.

MR. SALIBRA: Well, I - -

THE COURT: One way or the other.

MR. SALIBRA: yeah. The answer, I think, is that's not correct. We aren't going to get our money. We're going to get less money than we would have gotten if the bond was executed then. That's why were are here.....

Supreme Court, U.S.
FILED
MAY 29 2002
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No. 01-1594

IN THE

Supreme Court of the United States

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

PRUDENTIAL ASSURANCE COMPANY LIMITED, *et al.*,

Defendants,

-and-

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON

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APP 90

QUESTIONS PRESENTED

(1) Is there a compelling reason to grant a petition for writ of certiorari where the issues involved are of no consequence beyond the petitioner's monetary self-interest?

(2) Did the District Court properly tax against Alcan the costs of Underwriters' supersedeas bond pending Alcan's appeal?

(3) Did Alcan establish that the District Court Clerk's Office was "inaccessible" on the day after Thanksgiving or that the day after Thanksgiving is declared a holiday in California?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") entered its judgment on January 24, 2002. Alcan Aluminum Corporation ("Alcan") filed its petition for writ of certiorari on April 23, 2002 and the matter was placed on the docket on April 29, 2002. Alcan asserts jurisdiction in this Court based on 28 U.S.C. § 1257(a).

STATEMENT OF CASE

This case arises from an insurance coverage dispute between Alcan and its primary and excess insurers regarding Alcan's coverage for liability Alcan incurred in the *United States v. Stringfellow* and *Newman v. Stringfellow* lawsuits. Plaintiffs in those lawsuits sued Alcan because of its disposal activities at the Stringfellow Acid Pit Site in Riverside, California ("Stringfellow Site"). In 1995, Alcan filed suit against certain of its insurers seeking recovery of defense costs and indemnity payments incurred due to the *United States v. Stringfellow* and *Newman v. Stringfellow* claims.[1]

On June 19, 1997, the United States District Court for the Central District of California ("District Court") entered judgment in favor of Alcan against Underwriters for $1,544,302.53. On July 18, 1997, the District Court entered an amended judgment which was, as to the issues presently before this Court, identical to the June 19, 1997 judgment.

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1. The underlying lawsuits involved numerous claims for property damage and bodily injury allegedly caused by hazardous materials disposed of at the Stringfellow Site.

On August 1, 1997, Alcan appealed various rulings of the District Court's July 18, 1997 amended judgment to the Ninth Circuit. In particular, Alcan sought an increase in the amount of the judgment rendered against Underwriters. Because Alcan, the prevailing party, had appealed the District Court's judgment, Underwriters asserted that the execution of the judgment was automatically stayed and cited the United States Supreme Court decision, *Bronson v. LaCrosse & M. R. Co.*[2] The District Court disagreed with Underwriters' assertion and ordered Underwriters to pay the judgment on October 6, 1997. In response, Underwriters posted a supersedeas bond in the amount of $1,132,341.06 (which reflects the gross judgment of $1,544,302.53 less the proportionate share of insolvent non-represented companies) on November 21, 1997. Alcan was dissatisfied with the supersedeas bond and threatened to execute on the judgment. Thus, Underwriters filed an *ex parte* motion seeking clarification that Underwriters were entitled to post a supersedeas bond under the District Court's October 6, 1997 order. On November 24, 1997, the District Court granted Underwriters' *ex parte* motion and allowed the posting of the bond.

Alcan appealed the District Court's November 24, 1997 ruling to the Ninth Circuit, asserting that the District Court had erred in allowing Underwriters to post a supersedeas bond. On March 31, 1999, the Ninth Circuit held that execution of the District Court's July 18, 1997 judgment was automatically stayed because Alcan, as the prevailing party, had appealed the District Court's judgment. In addition, the Ninth Circuit found that Underwriters should not have been

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2. 68 U.S. 405, 17 L. Ed. 616, 1 Wall 405 (1863).

required to post a supersedeas bond. In particular, the Ninth Circuit stated, in pertinent part:

> [O]nce Alcan filed its appeal challenging the merits of the district court's allocation order, the execution of the judgment against its insurers was automatically stayed. . . . The supersedeas bond actually provided Alcan protection that it was not entitled to because a bond was not required to stay the execution of the judgment in this case.[3]

Based on the Ninth Circuit's opinion that the District Court's judgment had been automatically stayed by Alcan's appeal, Underwriters filed a Motion for Adjustment of Post-Judgment Interest in the District Court on July 27, 1999. Underwriters argued that post-judgment interest should not have accrued during the time period of Alcan's appeal because the judgment was automatically stayed during the pendency of that appeal. Underwriters also argued that the inception of post-judgment interest should be the entry date of the District Court's amended judgment (July 18, 1997). In response, Alcan asserted that Underwriters should not benefit from the Ninth Circuit's judgment because Underwriters did not appeal the order regarding the posting of the supersedeas bond.

On August 23, 1999, the District Court granted Underwriters' motion and held in pertinent part that: (1) the proper post-judgment interest inception date is July 18, 1997; (2) post-judgment interest is owed from July 18, 1997 (date of the amended judgment) to August 1, 1997 (date Alcan

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3. *Alcan Aluminum Corp. v. Prudential, et al.*, 173 F.3d 859, 1999 WL 201610 (9th Cir 1999), p. 4.

filed its appeal) and from August 2, 1999 (date the Ninth Circuit's mandate was filed and spread in the District Court) until the date the judgment is paid; and (3) post-judgment interest did not accrue during the pendency of Alcan's appeal because the appeal resulted in an automatic stay of the District Court's judgment.

On November 29, 1999 (the Monday after Thanksgiving day), Alcan filed its Notice of Appeal on the post-judgment interest issues. On January 24, 2002, the Ninth Circuit held that Alcan's appeal on this issue was untimely and, thus, that it had no jurisdiction to hear the appeal because the timely filing of a notice of appeal is "mandatory and jurisdictional." Alcan's appeal was untimely because the Notice of Appeal was due on November 26, 1999, the Friday after Thanksgiving, and Alcan filed its Notice of Appeal on November 29, 1999, the Monday after Thanksgiving. The Ninth Circuit ruled that Alcan's appeal was not timely filed because it was filed three days late and because Alcan failed to show that the District Court Clerk's Office was "inaccessible" on the day the appeal was due (the Friday after Thanksgiving) or that the Friday after Thanksgiving was "declared a holiday" in California.[4] On this Court, Alcan seeks review of this ruling and of the post-judgment interest issues.

On August 11, 1999, Underwriters filed a Bill of Costs with the Clerk of Court to recover the bond premiums they had paid to post the supersedeas bond. The Clerk of Court, however, denied Underwriters' Bill of Costs. Underwriters then filed a motion with the District Court to reverse the Clerk of Court's ruling, asserting that the federal and local rules of Civil Procedure provide that premiums paid for a

4. Fed. R. App. P. 26(a)(3) and (4).

supersedeas bond should be taxed in favor of the prevailing party. On December 6, 1999, the District Court ruled in Underwriters' favor and ordered Alcan to pay Underwriters' bond costs. Alcan also appealed this ruling to the Ninth Circuit. On January 24, 2002, the Ninth Circuit affirmed the District Court's judgment awarding Underwriters their supersedeas bond costs. The Ninth Circuit held that because the District Court's July 18, 1997 judgment was automatically stayed during the pendency of Alcan's appeal: (1) Alcan had no right to force Underwriters to pay the judgment; (2) Underwriters were not required to post the bond; and (3) the bond actually served to protect Alcan's interests.[5] Alcan also seeks review of this ruling.

CLARIFICATION

Counsel are obligated to advise this Court of any perceived misstatements of the law or fact made in petition for writ of certiorari.[6] Accordingly, Underwriters note the following.

Alcan asserts that the Ninth Circuit "created a new right in the district court to permit it to assign costs of the insurer's bond. . . ." The District Court's order requiring that Alcan pay Underwriters' bond costs is based on local court rules and the Federal Rules of Appellate Procedure, which provide

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5. *Alcan Aluminum Corp. v. Prudential, et al.*, 173 F.3d 859, 1999 WL 201610, p. 4 (9th Cir. 1999). ("The supersedeas bond actually provided Alcan protection that it was not entitled to because a bond was not required to stay execution of the judgment in this case.")

6. U.S. Sup. Ct. Rule 15(2).

that costs on appeal, including premiums paid for a supersedeas bond, are taxable for the benefit of the party entitled.[7]

REASONS FOR DENYING THE WRIT

I. Alcan Fails To Raise An Important Federal Question Or Articulate A Compelling Reason To Justify Discretionary Review By This Court.

Supreme Court review on a writ of certiorari is a matter of judicial discretion, which is granted only for "compelling" reasons.[8] Under U.S. Sup. Ct. Rule 10, there are certain factors which the Supreme Court considers in determining whether to grant a petition for writ for certiorari. In sum, these factors include: (1) whether either a United States Court of Appeal or a state court of last resort has entered a conflicting decision on the same important matter; (2) whether such a decision has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's supervisory powers; (3) whether a court has decided an important question of federal law that has not been, but should be, settled by the Supreme Court; or (4) whether a court has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. U.S. Sup. Ct. Rule 10 further provides that "[a] petition for writ of certiorari is

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7. Fed. R. App. P. 39(e) and Local Rule 16.4.15 for the United States Central District of California.

8. U.S. Sup. Ct. Rule 10, 28 U.S.C.A.

rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Alcan's petition fails to: (1) meet any of the criteria set forth by Sup. Ct. Rule 10; (2) raise any compelling reason for review of the Ninth Circuit's judgment by this Court; or (3) present an important federal question. Indeed, the Ninth Circuit's judgment does not conflict with the decision of another United States court of appeals, a state court of last resort or with a decision of this Court.

With regard to whether a petition for writ of certiorari should be granted, this Court has stated the following:

- [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.[9]

- [T]his Court does not sit to satisfy a scholarly interest. . . . Nor does it sit for the benefit of particular litigants.[10]

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9. *Rice v. Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70, 79, 75 S. Ct. 614, 619-620, 99 L. Ed. 897 (1955), *citing Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923).

10. *Id.*, 349 U.S. at 74, 75 S. Ct. at 616 (citations omitted).

Alcan has failed to present a compelling reason for this court to exercise its discretionary judicial review as Alcan seeks review of issues, which are of no significance to the public, but rather are of consequence only to Alcan's own monetary interest. Specifically, Alcan seeks review of the Ninth Circuit's rulings that Alcan was obligated to pay Underwriters' bond costs and that Alcan's Notice of Appeal was not timely filed. Although not addressed by the Ninth Circuit, Alcan also seeks review of the District Court's judgment that post-judgment interest accrued from the date of the amended judgment (July 18, 1997) and that post-judgment interest did not accrue during the pendency of Alcan's appeal. These rulings obviously have no precedential value to warrant this Court's discretionary review. In addition, it is evident that the outcome of the issues Alcan appeals lack national significance. The outcome of the issues will only affect whether Alcan is obligated to pay Underwriters' bond costs, whether Alcan timely filed its appeal on the post-judgment interest issues and whether post-judgment interest was properly calculated.

II. The District Court Properly Taxed Underwriters' Bond Costs Against Alcan.

Alcan seeks review of the Ninth Circuit's ruling affirming the District Court's taxing of Underwriters' bond costs against Alcan. Federal Rule of Appellate Procedure 39(e) provides that ". . . costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule. . . ." This rule includes premiums paid for a supersedeas bond.[11] The plain language of Rule 39(e) shows that the taxation of costs is mandatory. In addition, Federal Rule of Appellate

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11. Fed. R. of App. P. 39(e).

Procedure 39(a) provides, in effect, that the prevailing party is entitled to costs, *i.e.* "if a judgment is affirmed, costs are taxed against the appellant." Because the insurers, including Underwriters, prevailed at the Ninth Circuit, they were clearly entitled to costs. In fact, the Ninth Circuit expressly stated that "[c]osts are awarded to defendants-appellees General, Lloyd's, Home and Continental."[12]

The taxing of Underwriters' bond costs against Alcan is further supported by the Ninth Circuit's ruling that Underwriters were not required to post the bond.[13] Based on the foregoing, it is clear that bond costs were properly awarded to Underwriters and that this issue does not require this Court's review.

III. The Issue Of Whether Alcan Timely Filed Its Appeal Does Not Warrant This Court's Review.

It is undisputed that Alcan filed its appeal three days late. The only issue before the Ninth Circuit was whether Alcan established that the District Court Clerk's Office was "inaccessible" on the day after Thanksgiving (November 26, 1999) when the appeal was due or whether that day was "declared a holiday" in California.[14] The lower court's findings that the Clerk's Office was not "inaccessible" and that the day after Thanksgiving was not "declared a holiday" are factual findings, which cannot be reversed absent a

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12. *Alcan*, 173 F.3d 859, 1999 WL 201610 at p. 4.

13. *Id.*

14. Fed. R. App. P. 26(a)(3) and (4); *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741 (9th Cir. 2001).

conclusion that the factual findings are clearly erroneous. According to Sup. Ct. Rule 10, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." On this basis alone, this Court should decline to review this issue.

Further, the lower courts' conclusion that Alcan failed to show that the Clerk's Office was "inaccessible" on the day after Thanksgiving when the appeal was due or that the day was "declared a holiday" in California is supported by the record and is not clearly erroneous. This Court has held that a court of appeals is without jurisdiction to review the merits of a case, where the notice of appeal was not timely filed.[15] Thus, the Ninth Circuit correctly dismissed Alcan's appeal on the post-judgment interest issues.

IV. Post-Judgment Interest Did Not Accrue During The Pendency Of Alcan's Appeal Because The Execution Of The Judgment Was Automatically Stayed.

Even if Alcan's appeal had been timely filed, Underwriters would have prevailed on the merits. Alcan asserts that it has been penalized for appealing the District Court's judgment by the denial of post-judgment interest during the pendency of its appeal. The Ninth Circuit, however, ruled that the execution of the District Court's judgment was automatically stayed by Alcan's appeal of that judgment.[16] In so holding, the Ninth Circuit relied on a

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15. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988).

16. *Alcan*, 173 F.2d 859, 1999 WL 201610 at p. 4.

decision of this Court, *Bronson v. La Crosse & M. R. Co.*, which closely resembles this case in that an appeal was filed by victorious plaintiffs.[17] In *Bronson*, this Court stated that because the plaintiffs had appealed the judgment, "it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal."[18] This Court also specifically stated that "[t]he appeal suspends the execution of the decree."[19] Accordingly, because execution of the judgment was suspended and post-judgment does not accrue on a judgment that is not due, the District Court properly ruled that post-judgment interest did not accumulate during the pendency of Alcan's appeal.

Alcan asserts that the United States Court of Appeals for the Fifth Circuit's decision in *Enserch Corp. v. Shand Morahan & Co., Inc.* conflicts with the lower courts' ruling that Alcan's appeal suspended execution of the judgment.[20] In actuality, that decision is not in conflict. Rather, the *Enserch* decision more narrowly interprets *Bronson*. In particular, the Fifth Circuit concluded that "*Bronson* suggests that a lower court judgment may be suspended without bond when the relief sought by the prevailing party on appeal is inconsistent with enforcement of the lower court's judgment."[21] The relief sought by Alcan in the underlying appeal was inconsistent with the District Court's judgment.

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17. 68 U.S. 405, 17 L. Ed. 616, 1 Wall. 405 (1863).

18. 68 U.S. (1 Wall) at 409-410.

19. *Id.* at 410

20. 918 F.2d 462 (5th Cir. 1990)

21. 918 F.2d at 464.

In particular, Alcan appealed the District Court's allocation ruling, alleging that the District Court's decision was legally unfounded and should be reversed. For this reason, enforcement of the judgment would have been inconsistent with the relief sought in Alcan's appeal. As such, even under *Enserch*, Alcan's appeal effected an automatic stay of the judgment against Underwriters and Underwriters were not required to post a bond. Thus, it is clear that *Enserch* does not conflict with the ruling at issue here.

Based on the foregoing, it is evident that the District Court's ruling is not in conflict with a decision of any court and that the result of Alcan's appeal has no significance beyond Alcan's monetary self-interest. Thus, this issue does not merit review.

V. The Date Of The Amended Judgment Is The Correct Inception Date For The Accruement Of Post-Judgment Interest.

Under 28 U.S.C. § 1961(a), "interest shall be calculated from the date of entry of judgment." While the District Court initially entered judgment on June 19, 1997, that judgment was clarified and the amended judgment was entered on July 18, 1997. Because the amended judgment was entered on July 18, 1997, that is the earliest date from which post-judgment interest can accrue. Thus, the District Court correctly ruled that post-judgment interest began accumulating on July 18, 1997. Because the lower court's conclusion on this issue was correct and the result is only of consequence to Alcan, this Court should decline to review it.

CONCLUSION

Alcan has fallen well short of articulating a compelling reason to justify the exercise of this Court's discretionary review. The issues involved have no importance beyond Alcan's monetary self-interest. The lower courts' rulings do not conflict with a decision of this court. The rulings have no precedential value and do not affect any matter of public consequence. Alcan's petition should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

ALCAN ALUMINUM CORPORATION

Petitioner,

v.

PRUDENTIAL ASSURANCE COMPANY LIMITED

et al.

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS BRIEF IN OPPOSITION

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ARGUMENT

Lloyd's opposition is notable in two distinct respects. First, it carefully avoided addressing the issue of the use of unpublished-nonprecedential opinions and the abuses illustrated by that practice in this case. It did so because it had no way of effectively demonstrating that this practice has not lead to demonstrable judicial abuse. Second, and the linchpin of the second element of its response, was to claim that the *Bronson & Soutter v. La Crosse & Milwaukee R.R.*, 68 U.S. 405 (1863) case rendered by this Court during the Civil War was a complete and adequate explanation for the entire series of events in this case and the obvious refusal of the Ninth Circuit to apply California law.

I. LLOYD'S DOES NOT DISPUTE THAT BY DENYING ALCAN POST JUDGMENT INTEREST ON THE AMOUNTS THAT WERE UNDISPUTED ALCAN HAS BEEN ECONOMICALLY PENALIZED FOR APPEALING CITING EXCLUSIVELY TO *BRONSON*.

Whatever one might urge that *Bronson* stands for, it seems beyond dispute that there is no holding in that case that post-judgment interest, a creature of the Federal Rules adopted many decades later, stops running. Instead, Lloyd's simply makes the illogical leap that a stay of execution of the judgment is the economic equivalent of the elimination of post-judgment interest.

It makes no effort to reconcile this bizarre reasoning with the clear statement by this Court in *Kaiser Aluminum & Chem. Corp. v. Bonjorno, 49 U.S. 827, 835-836 (1990)*, that the purpose of post-judgment interest is to simply protect the value of the judgment during the delay in payment due to the loss of the time value of money. Nor does Lloyd's, offer any logic which supports its argument that simply because a judgment's execution is delayed it must be devalued. It does not follow that because a mortgage agreement by its terms my not be subject to foreclosure the accrual of interest stops.

Finally, Lloyd's makes a disingenuous statement verging on misrepresentation that there is no conflict between *Enserch Corp. v. Shand Morahand & Co.*, 918 F.2d 462 (5th Cir. 1990) and *Bronson* by attempting to create the illusion of an inconsistency between our judgment and that in *Bronson*. *Bronson* clearly involved a conflict between the nature of the initial judgment and the potential judgment after appeal. This case is clearly different since our initial judgment amount is not impacted by the appeal. Alcan would simply be entitled to more money and in all other respects the amount already owed remains the same whether Alcan won the appeal or not. Moreover, as Alcan clearly demonstrated in its initial submission, Lloyd's never argued it was entitled to a stay because of any inconsistency between the first judgment and the appeal. Instead, it simply did not want to be put to the inconvenience of collecting from its syndicates twice. (Petition at 11)

All that Lloyd's can offer for its alleged inconsistency is that the appeal requests that the district court's opinion "should be reversed". Or, put another way, the nature of an appeal is a request that the district court should be reversed. Thus, under Lloyds distorted reasoning every appeal results in an inconsistency between the initial judgment and the requested appellate relief.

Rather than offering support for its position that this Court should disregard review of this case, Lloyd's Response illustrates the low level to which the legal process has fallen in this country due in no insubstantial measure by this Court's failure to insist on responsible accountable conduct by the inferior court's which now believe they can do or say what they will without consequence and accountability– a practice which is now being emulated by the bar.

II. LLOYDS' ARGUMENT THAT RULE 39(E) PERMITS THE DISTRICT COURT TO TAX THE COST OF THEIR BOND TO ALCAN SIMPLY DEMONSTRATES THAT EVEN LLOYD'S DOES NOT BELIEVE THAT THE DISTRICT COURT AND THE NINTH CIRCUIT OFFERED PLAUSIBLE JUSTIFICATION FOR WHAT THE DISTRICT COURT AND THE NINTH CIRCUIT DID

The Clerk of the District Court rejected Lloyd's argument that Rule 39(e) applied noting that it did not prevail with respect to the amount subject to the bond. That amount was still owed. If Lloyd's had thought the bond was not required, it should have appealed that issue. It did not.

Lloyd's then took its argument to the district court which granted Lloyd's request placing the costs of the bond on Alcan. However, the district court did not rely on Rule 39(e) since that rule was clearly irrelevant.

The matter was submitted to the Ninth Circuit on Alcan's appeal where Lloyd's again tried to resurrect Rule 39(e). Even the Ninth Circuit did not apply that rule because claiming it was relevant was ludicrous, and the court instead created the bizarre explanation that the action of the district court was like granting legal fees (albeit after an appeal had theoretically finally resolved all the issues in dispute) citing *LSO Ltd., v. Strohs,* 205 F.3d 1146 (9th Cir. 2000).

III. LLOYDS' ATTEMPT TO CHARACTERIZE THE ISSUE OF THE EFFECTIVE DATE OF JUDGMENT AS SIMPLY A MATTER OF IMPROPERLY CALCULATING THE INTEREST FROM THE CORRECT DATE IS A PATENT MISREPRESENTATION OF THE FACTS. AS IT ADMITS THE JUDGMENT WAS AMENDED FOR THE

CONVENIENCE OF ANOTHER INSURER TO CLARIFY A MATTER SOLELY WITH RESPECT TO IT, NEITHER THE RIGHTS OF LLOYD'S OR ALCAN WERE MODIFIED BY THE CHANGE AND EACH OF THE OTHER INSURERS PAID INTEREST CALCULATED FROM THE ORIGINAL DATE. THE REAL ISSUE IS WHETHER COURTS CAN MODIFY LEGAL OBLIGATIONS FOR THEIR FORMER CLIENTS WHO HAVE CHOSEN NOT TO APPEAL THE ISSUE.

Lloyd's argument with respect to the date of judgment and post judgment interest is simply another variation of the non-transparent federal legal system which is becoming the dominant mode of conduct in this Country because this Court appears to be indifferent. Clearly, this was a case where lawyers for Alcan were trying to exercise civility and professional courtesy to its opposing counsel by not giving a colleague a hard time in amending a clerical error in a judgment. Lloyd's was part of this effort and it was understood that fundamental legal rights were not going to be compromised.

However, after appeal Lloyds with their former lawyer who is now the district judge jumped on this courtesy to further enhance Lloyd's position. If this was a matter of legitimate concern it should have been raised in appeal and resolved by a published precedential opinion. If Alcan's courtesy was at its peril and courts were not going to honor and encourage professional conduct, they should say it publicly so others are forewarned. By allowing the conduct of the court in punishing courtesy to remain hidden and then taking to the public platform to lament the sorry state of professional ethics, this Court is engaging in the worse form of hypocrisy.

IV. LLOYDS' ATTEMPT TO CHARACTERIZE THE NINTH CIRCUIT'S DECISION CONCERNING THE DAY AFTER THANKSGIVING AS A TRIVIAL FACTUAL DISPUTE IS DISINGENUOUS BECAUSE IT IGNORES THE FACT THAT THE ISSUE WOULD HAVE WIDESPREAD IMPORTANCE IN CALIFORNIA AND PERHAPS OTHER STATES WHERE THE DAY HAS ALL THE PRACTICAL ATTRIBUTES OF A STATE HOLIDAY.

Lloyd's ignores the fact that the Ninth Circuit's decision that the Friday after Thanksgiving is not really a State holiday is clearly an attempt by the Ninth Circuit to construct a rule of law only applicable to Alcan. It ignores this fact because it cannot explain why this ruling would not be of significant importance to numerous people. Alcan's attempt to file on Friday by use of an Express Courier service is typical. The fact that it was unsuccessful demonstrates that the "legally accessible courthouse" may not be practically accessible by conventional means. The bar deserves to know about this curious set of circumstances. The fact that Friday which had all the attributes of a State Holiday, but was really only a state declared "administrative" holiday which had legal significance to the Ninth Circuit, but no practical significance apparently to anyone else, is also something worthy of widespread dissemination.

Clearly, the reasoning behind this rather remarkable conclusion on the nature of the Friday holiday was not something that should not be published and precedential because exhaustive research was required. It was not published and made precedential because if it was published the Ninth Circuit had no intention of ever applying it anyone but Alcan.

Finally, Lloyds clearly mischaracterizes the determination that the Friday after Thanksgiving was not State Holiday as a "factual" finding and therefore did not merit this Court's attention. This assertion is simply wrong. There are no disputes

as to what the Governor did or whether the State Offices were closed. The issue is exclusively the legal significance of those facts—a legal issue.

V. LLOYDS' OPPOSITION DOES NOTHING TO DISPUTE THE FACT THAT THE ENTIRE COURSE OF CONDUCT BY THE COURTS EVIDENCES A SYSTEMATIC EFFORT TO FRUSTRATE THE APPLICATION OF THE RULE OF LAW.

Whether or not one might be able offer a plausible explanation for one of the issues raised by Alcan, it is clear that the combination of behavior by the courts including the clearly recorded conduct by the district court relying explicitly on his personal experiences as a lawyer for Lloyd's in contriving a result clearly not authorized by the Federal Rules (the right to a stay for the administrative convenience of a non-appealing party)[1] is clearly beyond legitimate explanation. Tragically, this type of judicial conduct is becoming commonplace and this Court's failure to address it is viewed as a license to act without accountability.

Lloyds' Opposition asks this Court to place its stamp of approval on its use of a hyper-technical rationale to take advantage of professional courtesy by ignoring its abuse. It further asks this Court to undercut the finality of the appellate process by allowing non-appealed rights to be modified after appeal by a compromised lower Court. In short, it invites this Court to become part of the problem not part of the solution.

Dated: June 6, 2002

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[1] The district court had concurred with the 5th Circuit that *Bronson* was no longer viable after the adoption of the Federal Rules of Civil Procedure, which did not incorporate the *Bronson* rational.

Respectfully submitted,

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